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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., ET AL., PETITIONERS,

vs.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1948.

CERTIORARI GRANTED MARCH 29, 1948

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under Rule 15(b)	1	1
Record from D. C. U. S., Southern District of New York	2	2
Summons in Supreme Court of New York	2	2
Complaint in Supreme Court of New York	3	2
Amended answer	11	8
Request for admissions	14	10
Sworn denial and admission	17	12
Papers read in support of motion for Summary Judgment:		
Notice of motion	18	12
Affidavit of Robert Glenn	20	13
Affidavit of J. Randall Creel	24	16
Deposition of David Joseph Townsend	29	19
Deposition of John Joseph Connell	46	34
Supplemental affidavit of James Randall Creel	74	57
Papers read in opposition to motion for summary judgment:		
Affidavit of David Joseph Townsend	65	51
Affidavit of John Joseph Connell	68	53
Affidavit of Jacob Bromberg	70	54

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—6629

		Original	Print
Record from D. C. U. S., Southern District of New York—Continued			
Opinion by Coxe, D. J.		77	59
Judgment on order		82	62
Notice of appeal		84	63
Stipulation as to record		86	64
Clerk's certificate	(omitted in printing)	87	
Opinion, Clark, J.		88	65
Judgment		99	73
Clerk's certificate	(omitted in printing)	101	
Order allowing certiorari		102	75

[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, Plaintiffs-Appellants,

against

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC. and The Arthur A. Johnson Corp., Doing Business as Bermuda Base Contractors, Defendants-Appellees

STATEMENT UNDER RULE 15(b)

This action was commenced in the Supreme Court, New York County, by the service of the summonses and complaints on the defendants on or about October 20, 1945.

Prior to the service of their answer, defendants applied for leave to transfer the action to the United States District Court for the Southern District of New York. This application was granted ex-parte by order dated January 12, 1946.

Issue was joined by the service of the defendants' answer on or about February 9, 1946. An amended answer was served on or about April 6, 1946.

Defendants thereafter moved for summary judgment which was granted by Hon. Coxe, D. J., and judgment was entered on November 1st, 1946 dismissing the plaintiffs' complaint. No bail, arrest or attachment was made in this action.

Jacob Bromberg, Esq., 225 Broadway, New York City, appears for the plaintiffs.

Eidlitz, French, Fink and Markle, Esqs., 140 East 42nd Street, New York City, appear for the defendants, having been substituted in the place of Eidlitz, French and Sullivan.

Except as above there has been no change of parties or attorneys.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, Plaintiffs,

against

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC. and The Arthur A. Johnson Corp., Doing Business as Bermuda Base Contractors, Defendants

SUMMONS

Plaintiffs designate New York County as the place of trial.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, September 26th, 1945.

Jacob Bromberg, Attorney for Plaintiffs, Office & P. O. Address, 225 Broadway, New York City.

[fol. 3] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

COMPLAINT

Plaintiffs, for their complaint, complaining of the defendants, by their attorney, Jacob Bromberg, allege as follows:

First: This action is brought under the Fair Labor Standards Act of 1938, U. S. C. Title 29, Section 201, et seq. hereinafter called the "Act."

Second: That the defendant, The Arthur A. Johnson Corp., is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains an office for the transaction of its business in the City of New York, within the jurisdiction of this Court.

Third: That the defendant, Necaro Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains an office [fol. 4] for the transaction of its business in the City of New York, within the jurisdiction of this Court.

Fourth: That the defendant, Vermilya-Brown Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York and maintains an office for the transaction of its business in the City of New York, within the jurisdiction of this Court.

Fifth: That during all the times hereinafter mentioned the defendants were engaged in a joint venture and transacted business under the trade name and style of "Bermuda Base Contractors."

Sixth: That during all the times hereinafter mentioned defendants furnished labor, services and materials in interstate and foreign commerce or in the production of goods for interstate or foreign commerce.

Seventh: That the plaintiffs were employed by and worked for the defendants in divers capacities, as hereinafter set forth, and in such capacities each plaintiff rendered services in connection with such interstate and foreign commerce or the production of goods for interstate and foreign commerce.

Eighth: From about September 9th, 1941 to April 27th, 1943 the plaintiff, John Joseph Connell, was employed by and worked for the defendants as a fireman.

Ninth: Upon information and belief, during the stated period the plaintiff, John Joseph Connell, worked for the defendants in the stated capacity for more than 1,746 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

[fol. 5] Tenth: From about December 8th, 1941 to May 6th, 1943 the plaintiff, Eugene T. Fitzpatrick, was employed by and worked for the defendants as a fireman.

Eleventh: Upon information and belief, during the stated period the plaintiff, Eugene T. Fitzpatrick, worked for the defendants in the stated capacity for more than 1,775 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twelfth: From about April 26th, 1942 to May 12th, 1943 the plaintiff, William L. Flanagan, was employed by and worked for the defendants as a patrolman.

Thirteenth: Upon information and belief, during the stated period the plaintiff, William L. Flanagan, worked for the defendants in the stated capacity for more than 1,242 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Fourteenth: From about May 6, 1942 to May 12th, 1943 the plaintiff, Joseph John Gilroy, was employed by and worked for the defendants as a fireman-patrol.

Fifteenth: Upon information and belief, during the stated period the plaintiff Joseph John Gilroy, worked for the defendants in the stated capacity for more than 1,219 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Sixteenth: From about May 6th, 1942 to May 12th, 1943 the plaintiff, John Joseph Mortimer, was employed by and worked for the defendants as a fire-patrolman.

Seventeenth: Upon information and belief, during the stated period the plaintiff, John Joseph Mortimer, worked [fol. 6] for the defendants in the stated capacity for more than 1,219 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Eighteenth: From about August 13th, 1942 to May 12th, 1943 the plaintiff, James F. McDonald, was employed by and worked for the defendants as a policeman.

Nineteenth: Upon information and belief, during the stated period the plaintiff, James F. McDonald, worked for the defendants in the stated capacity for more than 897 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twentieth: From about December 17th, 1941 to December 9th, 1942 the plaintiff, Paul F. Nieter, was employed by and worked for the defendants as a policeman.

Twenty-first: Upon information and belief, during the stated period the plaintiff, Paul F. Nieter, worked for the defendants in the stated capacity for more than 1,172 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-second: From about August 9th, 1942 to February 13th, 1943 the plaintiff, William H. Parker, Jr., was employed by and worked for the defendants as a policeman.

Twenty-third: Upon information and belief, during the stated period the plaintiff, William H. Parker, Jr., worked for the defendants in the stated capacity for more than 621 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-fourth: From about September 6th, 1941 to May 13th, 1943 the plaintiff, Louis August Rehberg, was employed by and worked for the defendants as a patrolman.

[fol. 7] Twenty-fifth: Upon information and belief, during the stated period the plaintiff, Louis August Rehberg, worked for the defendants in the stated capacity for more than 1,978 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-sixth: From about March 23rd, 1942 to May 10th, 1943 the plaintiff, Howard L. Shock, Jr., was employed by and worked for the defendants as a patrolman.

Twenty-seventh: Upon information and belief, during the stated period the plaintiff, Howard L. Shock, Jr., worked for the defendants in the stated capacity for more than 1,357 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Twenty-eighth: From about December 6th, 1941 to May 12th, 1943 the plaintiff, David Joseph Townsend, was employed by and worked for the defendants as a patrolman.

Twenty-ninth: Upon information and belief, during the stated periods the plaintiff, David Joseph Townsend, worked for the defendants in the stated capacity for more than 1,702 hours in excess of the times provided by the Act for the respective periods of time therein set forth.

Thirtieth: The hours stated in the preceding paragraphs are approximate and represent each plaintiff's best present estimate of the number of excess hours.

Thirty-first: The defendants failed and refused to compensate the plaintiffs for their employment for the time in excess of the hours provided by the Act, at rates not less than one and one-half times the regular rates at which plaintiffs were then employed by the defendants, and have failed and refused to compensate the plaintiffs in any way for the said overtime, except as hereinafter set forth.

[fol. 8] Thirty-second: By employing the plaintiffs for work weeks in excess of those provided by the Act without compensating the plaintiffs at rates provided by the Act the defendants have violated the Act.

Thirty-third: By reason of such violation the plaintiffs, in addition to the statutory compensation, are entitled to damages under the Act computed upon the basis of one and one-half times the regular rates at which defendants employed the plaintiffs as hereinafter set forth.

Thirty-fourth: By reason of the foregoing the plaintiff, John Joseph Connell, is entitled to $3,607.50 statutory compensation, no part of which has been paid except the sum of $885.00, together with $2,722.50 damages, making a total of $5,445.00.

Thirty-fifth: By reason of the foregoing the plaintiff, Eugene T. Fitzpatrick, is entitled to $3,106.25 statutory compensation, no part of which has been paid except the sum of $766.50, together with $2,339.75 damages, making a total of $4,679.50.

Thirty-sixth: By reason of the foregoing the plaintiff, William L. Flanagan, is entitled to $2,180.50 statutory compensation, no part of which has been paid except the sum of $567.00, together with $1,613.50 damages, making a total of $3,227.00.

Thirty-seventh: By reason of the foregoing the plaintiff, Joseph John Gilroy, is entitled to $2,132.19 statutory compensation, no part of which has been paid except the sum of $556.50, together with $1,575.69 damages, making a total of $3,151.38.

[fol. 9] Thirty-eighth: By reason of the foregoing the plaintiff, John Joseph Mortimer, is entitled to $2,132.19 statutory compensation, no part of which has been paid except the sum of $556.50, together with $1,575.69 damages, making a total of $3,151.38.

Thirty-ninth: By reason of the foregoing the plaintiff, James F. McDonald, is entitled to $1,569.75 statutory compensation, no part of which has been paid except the sum of $409.50, together with $1,160.25 damages, making a total of $2,320.50.

Fortieth: By reason of the foregoing the plaintiff, Paul F. Nieter, is entitled to $2,051.00 statutory compensation, no part of which has been paid except the sum of $493.50, together with $1,558.50 damages, making a total of $3,117.00.

Forty-first: By reason of the foregoing the plaintiff, William H. Parker, is entitled to $1,086.75 statutory compensation, no part of which has been paid except the sum of $283.50, together with $703.25 damages, making a total of $1,406.50.

Forty-second: By reason of the foregoing the plaintiff, Louis August Rehberg, was entitled to $3,461.50 statutory compensation, no part of which has been paid except the sum of $903.00, together with $2,558.50 damages, making a total of $5,117.00.

Forty-third: By reason of the foregoing the plaintiff, Howard L. Shock, Jr., is entitled to $2,374.75 statutory compensation, no part of which has been paid except the sum of $619.50, together with $1,755.25 damages, making a total of $3,510.50.

[fol. 10] Forty-fourth: By reason of the foregoing the plaintiff, David Joseph Townsend, is entitled to $3,171.70 statutory compensation, no part of which has been paid except the sum of $772.80, together with $2,398.90 damages, making a total of $4,797.80.

Wherefore:

Plaintiff, John Joseph Connell, demands judgment in the sum of $2,722.50, with appropriate interest;

Plaintiff, Eugene T. Fitzpatrick, demands judgment in the sum of $4,679.50, with appropriate interest;

Plaintiff, William L. Flanagan, demands judgment in the sum of $3,227.00, with appropriate interest;

Plaintiff, Joseph John Gilroy, demands judgment in the sum of $3,151.38, with appropriate interest;

Plaintiff, John Joseph Mortimer, demands judgment in the sum of $3,151.38, with appropriate interest;

Plaintiff, James F. McDonald, demands judgment in the sum of $2,320.50, with appropriate interest;

Plaintiff, Paul F. Nieter, demands judgment in the sum of $3,117.00, with appropriate interest;

Plaintiff, William H. Parker, Jr., demands judgment in the sum of $1,406.50, with appropriate interest;

Plaintiff, Louis August Rehberg, demands judgment in the sum of $5,117.00, with appropriate interest;

Plaintiff, Howard L. Shock, Jr., demands judgment in the sum of $3,510.50, with appropriate interest;

Plaintiff, David Joseph Townsend, demands judgment in the sum of $4,497.80, with appropriate interest; and

[fol. 11] In addition thereto each plaintiff demands a reasonable attorney's fee pursuant to Section 16b of the Act, together with costs and disbursements of this action.

Jacob Bromberg, Attorney for Plaintiffs, Office & P. O. Address, 225 Broadway, New York City.

In United States District Court, for the Southern District of New York

John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr., and David Joseph Townsend, Plaintiffs,

—against—

Vermilya-Brown Company, Inc., Necaro Company, Inc., and The Arthur A. Johnson Corp., Doing Business as Bermuda Base Contractors, Defendants

(Civil Action 34-733)

Amended Answer

The defendants by Eidlitz, French and Sullivan, their attorneys for their amended answer herein, allege, upon information and belief.

[fol. 12] First: Deny that they have any knowledge or information thereof sufficient to form a belief with respect to any of the allegations contained in paragraphs thereof marked "First" and "Thirtieth."

Second: Deny each and every allegation contained in paragraphs thereof marked "Sixth", "Ninth", "Eleventh", "Thirteenth," "Fifteenth", "Seventeenth", "Nine-

teenth", "Twenty-first", "Twenty-third", "Twenty-fifth", "Twenty-seventh", "Twenty-ninth", "Thirty-first", "Thirty-second", "Thirty-third", "Thirty-fourth", "Thirty-fifth", "Thirty-sixth", "Thirty-seventh", "Thirty-eighth", "Thirty-ninth", "Fortieth", "Forty-first", "Forty-second", "Forty-third" and "Forty-fourth".

Third: Deny each and every allegation in paragraphs thereof marked "Seventh", "Eighth", "Tenth", "Twelfth", "Fourteenth", "Sixteenth", "Eighteenth", "Twentieth", "Twenty-second", "Twenty-fourth", "Twenty-sixth" and "Twenty-eighth" except that the defendants admit that the respective plaintiffs were employed by the defendants for the respective periods of time alleged in said paragraphs (without admitting, however, the number of alleged excess hours), under written contracts, later modified, and for the particular terms and conditions of which said contracts, the defendants beg leave to refer to the originals thereof upon the trial of this action.

As and for a First, Separate and Complete Defense to the Cause of Action Set Forth in the Complaint, the Defendants Allege upon Information and Belief:

Fourth: That the plaintiffs in the performance of their respective duties were not engaged in commerce nor in the production of goods for commerce within the meaning and [fol. 13] purview of the Fair Labor Standards Act of 1938 as amended, nor are they covered by, within the scope of or subject to the terms, provisions and conditions of the said Fair Labor Standards Act of 1938 as amended.

As and for a Second, Separate and Complete Defense to the Cause of Action Set Forth in the Complaint, the Defendants Allege Upon Information and Belief:

Fifth: That the provisions of the Fair Labor Standards Act of 1938 as amended, did not apply to the plaintiffs and that the plaintiffs were exempt therefrom under Section 213 of said Act.

Wherefore, defendants demand judgment dismissing the complaint herein together with the costs and disbursements of this action.

Eidlitz, French and Sullivan, by Joseph Markle, a Partner of the Firm, Attorney for the Defendants, Office & P. O. Address, No. 110 East 42nd Street, Borough of Manhattan, City of New York.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

REQUESTS FOR ADMISSIONS

Please take notice that the defendants Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, request the plaintiffs herein to make the following admissions within ten (10) days after the service of this request, for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial; that each of the following statements is true:

1. During all times pertinent to this action the defendants Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, were corporations engaged in a joint venture under a cost-plus-a-fixed-fee contract with the United States of America, Division of Engineers, United [fol. 15] States Army, Contract No. W 958-eng-50, for the construction of an outlying defense base at the Island of Bermuda, which defense base consists of and is more particularly known as Fort Bell and Kindley Field, located in the leased areas of the Island of Bermuda, leased under the Executive Agreement dated March 27th, 1941 between the United States of America and the Government of Great Britain and Northern Ireland.

2. That the plaintiffs John Joseph Connell, William L. Flanagan, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg and Howard L. Shock, Jr. were employed by the defendants as patrolmen and as such performed the duties of patrolmen in furnishing police protection to the construction work being performed by the defendants under Contract No. W 958-eng-50 for the United States Army at Fort Bell and Kindley Field in the leased areas of the Island of Bermuda, leased under the terms of the Executive Agreement dated March 27th, 1941 between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland.

3. That the plaintiffs Eugene T. Fitzpatrick, Joseph John Gilroy, John Joseph Mortimer and David Joseph

Townsend were employed by the defendants as firemen-patrolmen and as such performed the duties of firemen in furnishing fire protection to the construction work being performed by the defendants under Contract No. W 958-eng-50 for the United States Army for the construction of Fort Bell and Kindley Field in the leased areas of the Island of Bermuda, leased under the terms of the Executive Agreement dated March 27th, 1941, between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland.

[fol. 16] 4. That all of the construction work provided in Contract No. W 958-eng-50 between the United States of America and the defendants was original construction and that no part thereof was reconstruction or repair.

5. That each of the plaintiff performed the duties of his employment as patrolman or fireman-patrolman within the territorial limits of the Island of Bermuda and more particularly within the leased areas thereof, leased under the terms of the Executive Agreement dated March 27th, 1941 between the United States of America and the Government of Great Britain and Northern Ireland.

And please take notice that if the plaintiffs serve a sworn denial of the above facts or any of them, the defendants, upon the truth of such fact or facts, will apply to the Court for an order requiring the plaintiffs to pay to the defendants the reasonable expenses incurred in making such proof, including reasonable expense for witnesses and attorneys' fees as is provided in the Rules of Civil Procedure for the District Courts of the United States.

Dated: July 23rd, 1946.

Yours, etc., Eidlitz, French, Fink and Markle, Attorneys for Defendants, Office & P. O. Address, No. 110 East 42nd Street, Borough of Manhattan, City of New York.

To: Jacob Bromberg, Esq., Attorney for Plaintiffs, Office & P. O. Address, No. 225 Broadway, Borough of Manhattan, City of New York.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

SWORN DENIAL AND ADMISSION

STATE OF NEW YORK,
County of New York, ss:

John Joseph Connell, being duly sworn, says:

I am one of the plaintiffs above named and am fully familiar with all of the facts and circumstances involved in the above entitled action.

Plaintiffs refuse to admit so much of paragraph No. 2 of defendants' request for admissions dated July 23, 1946 which alleges that John Joseph Connell was employed as a patrolman and instead admit that said John Joseph Connell was employed as a fireman-patrolman.

Plaintiffs refuse to admit so much of paragraph No. 3 of defendants request for admissions dated July 23, 1946 [fol. 18] which alleges that David Joseph Townsend was employed as a fireman-patrolman and instead admit that he was employed as a police patrolman.

Plaintiffs refuse to admit the facts set forth in paragraph No. 5 of defendants' request for admissions dated July 23, 1946, because, in addition to the duties set forth in said paragraph, the plaintiffs also were required to and actually did render services in the City of St. George, on St. David's Island and other areas outside these islands aboard ferry boats, tugs, and other vessels in the navigable water around Bermuda and St. David's Island.

John Joseph Connell.

(Sworn to the 31st day of August, 1946.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

[fol. 19] SIRS:

Please take notice that the undersigned upon the annexed affidavits of Robert Glenn and J. Randall Creel will

move this Court at Room No. 506, U. S. Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 17th day of September, 1946, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for summary judgment in favor of the defendants, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, N. Y., September 3, 1946.

Yours, etc., Eidlitz, French, Fink and Markle, Attorneys for Defendants, Office & P. O. Address, 110 East 42nd Street, Borough of Manhattan, City of New York.

To Jacob Bromberg, Esq., Attorney for Plaintiffs, 220 Broadway, Borough of Manhattan, City of New York.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROBERT GLENN, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Robert Glenn, being duly sworn, deposes and says: That he was formerly employed by Vermilya-Brown Company, Inc., one of the defendant joint venture contractors; and that he was so employed during the years 1941, 1942 and 1943; that from March 1941 to July 1943 he was employed by the defendant joint venturers doing business as Bermuda Base Contractors as Superintendent on the job of the construction of the advance military bases on the Islands of Bermuda known as Fort Bell and Kindley Field, and that his duties as such required his presence at all times during [fol. 21] this period at the site of this construction work; that he has personal knowledge and is competent to testify as to all of the facts set out below; that he is thoroughly familiar with the construction work performed by the defendant joint venturers doing business as Bermuda Base Contractors in the erection of Fort Bell and Kindley Field, and that as Superintendent his duties in fact required him to run and supervise said construction work.

That all of the construction work in the construction of Fort Bell and Kindley Field was original construction. Even the site of much of the construction work had first to be prepared by the defendant joint venturer contractors in the leveling off of hills and filling in of bays and other bodies of water. This project was of a complex nature by reason of the many special features and types of work involved, including the grading and paving of approximately four miles of runways and eight and one-half miles of taxi ways, the installation of eight and one-half miles of sanitary and storm sewers, twenty-one miles of water mains, twenty-two and three-quarter miles of fibre and transit ducts, eighteen and one-half miles of power cables, forty-six and one-half miles of fire control cables or 13,211 conductor miles of cables, approximately eleven miles of road and highway, the construction of two hundred and eight--four temporary buildings, many semi-permanent buildings and numerous permanent buildings, including a two hundred bed hospital, laundry, refrigeration plant, fire plants, water evaporator plants, barracks, post exchange, telephone building, fire and guard house, bomb proof structures, gun emplacements and highways leading thereto, hangers, underground bomb proof storage and temporary construction camps for the housing and feeding of workmen. This project consisted of the construction of a self sustaining town, including highways and all other utilities. All of this construction work was new and original construction from the ground up.

[fol. 22] Your deponent is familiar with the duties performed by the plaintiffs in this action and knows that those duties consisted solely of furnishing police and fire protection to this construction work. Because of the magnitude of the construction work the small local police and fire forces of the British Government on the Island of Bermuda were completely inadequate and unprepared to provide the necessary police and fire protection. Military police were not used for police and fire protection since experience on other construction work had shown that unnecessary friction had developed between civilian construction workers and military police. It was therefore necessary for the defendant joint venture contractors as part of this construction work to set up and maintain during the course of the construction a company police force and company fire force. The plaintiffs were employed for this duty and were part of the company uniformed police and uniformed fire forces.

The plaintiffs who were employed as patrolmen performed the duties of a municipal policeman on his beat. The company police force had its own headquarters and guardhouse and the series of posts distributed over the construction work. The company police force was organized in three squads or shifts with a police lieutenant in charge of each and a police captain in charge of all three squads. The duties performed by the personnel of the company police force were such as those performed by any typical municipal police force.

The company fire force likewise had its fire house and station, and its equipment, consisting of chemical trucks, high pressure water systems, hose, etc. It was organized under a fire captain in charge of its three squads, each squad being placed under a fire lieutenant. The duties of the company fire force were the same as those of any typical municipal fire department.

[fol. 23] Both the company police and company fire force were uniformed and both forces were organized and existed solely for the purpose of supplying police and fire protection to the construction work. As the construction work neared completion both forces were cut down and disbanded. None of the plaintiffs ever performed any construction work.

All of the duties of the plaintiffs related to police and fire protection to the construction work being performed in the Islands of Bermuda. Though the plaintiffs were employed in the United States and transported to Bermuda they performed no services for the defendant joint venture contractors in the United States nor in transit to Bermuda. If any of the plaintiffs while in transit were assigned to any duties, such as life boat drills, abandon ship drills, submarine or mine lookout, blackout watch, sick bay or hospital watch, fire fighting watch or any other duty aboard ship, such services were performed by and at the instruction and request of the ship's captain and officers or Navy personnel, and are but duties regularly and commonly performed aboard ship by crew and passengers alike in time of War for the common safety of all concerned, and such duties performed aboard ship are not duties performed in the employment of the joint venture defendant contractors. None of the plaintiffs rendered services to the defendant joint venture contractors in any other place than the Islands of Bermuda.

Robert Glenn.

(Sworn to the 15th day of August, 1946.)

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. RANDALL CREEL, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss.:

J. Randall Creel, being duly sworn, deposes and says: That he is an attorney at law associated with the firm of Eidlitz, French, Fink and Markle, attorneys for the defendants. In such capacity he is in charge of the above entitled case. That heretofore your deponent addressed by letter an inquiry to the Department of State, United States of America, requesting information as to the status of those leased areas in the Islands of Bermuda leased under Executive Agreement of March 27th, 1941, by the United States of America from the United Kingdom of Great Britain and [fol. 25] Northern Ireland, and which are presently occupied by the military installations known as Fort Bell and Kindley Field.

That your deponent received the following communications in reply to his inquiry:

"Department of State
Washington

April 30, 1946.

In reply refer to
Le 811.34544/4-1846

Eidlitz, French, Fink and Markle, Counsellors at Law,
110 East 42nd Street, New York 17, New York.

SIRS:

The Department has received your letter of April 18, 1946, requesting to be advised whether 'any United States Courts other than Army and Navy Military Courts have been established at the leased area in the Island of Bermuda.'

There are no civil courts of the United States in any of the leased base areas obtained from Great Britain, including Bermuda.

Very truly yours, For the Acting Secretary of State: (Sgd.) Benedict M. English, Assistant to the Legal Adviser."

[fol. 26] "Department of State

Washington

June 20, 1946.

In reply refer to
Le 811.34544/5-146

Eidlitz, French, Fink & Markle, 110 East Forty-Second Street, New York 17, New York.

Sirs:

The Department has received your letter of May 1, 1946 with further reference to the status of bases leased from Great Britain.

The bases in Bermuda were obtained under the same circumstances as the other bases obtained from Great Britain as will be apparent from the documents contained in Executive Agreement Series 235 to which you were referred in a previous communication. As you were advised by the Department's letter of April 30, 1946 this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling or opinion on the matter.

Very truly yours, For the Acting Secretary of State: (Sgd.) R. W. Flournoy, Acting Legal Adviser."

That your deponent addressed an inquiry to the Director, Division of Territories and Island Possessions of the Department of the Interior, who by Title 48, Section 1, U. S. [fol. 27] Code, as amended, is charged with the civil government of all island possessions of the United States, requesting information as to what jurisdiction, if any, had been exercised by such Department over the leased areas on the Islands of Bermuda. By letter of August 2nd, 1946 H. Rex Lee, Acting Director, Divison of Territories and Island Possessions, U. S. Department of the Interior, advised in part as follows:

"We have never been given jurisdiction, by Executive order or by operation of the reorganization plan or other statute, over the Bermuda areas in which you are interested and have therefore had no occasion to take any action in 'matters pertaining to the civil government' thereof. Moreover, since the State Department

has advised you that there has been no claim made that the leased areas are possessions of the United States, even if 48 U. S. C. sec. 1 had given this Division jurisdiction over civil government in all United States possessions, we would have had no reason to take any action in connection with the leased areas."

There is no genuine issue as to any material fact on which this motion for summary judgment is based. Heretofore on July 23rd, 1946 the attorneys for the defendants served a request for admissions upon the attorneys for the plaintiffs which is duly filed herein, requesting the admission of material facts on which this motion is based and as to which it was believed there was no controversy.

No denial of any such request has been served upon the attorneys for the defendants within the ten (10) day period designated in said request, nor has any application been made to the Court for an extension of time, and the said facts set out in said request for admissions are now deemed admitted in accordance with the provisions of Rule 36 of the Rules of Civil Procedure for the District Courts of the United States.

[fol. 28] The facts which are so admitted are:

1. Each of the plaintiffs performed the duties of his employment within the territorial limits of the Island of Bermuda and more particularly within the leased areas thereof (Request No. 5).

2. The construction work performed by the defendants was original construction and no part thereof was reconstruction or repair (Request No. 4).

3. The sole duties of the plaintiffs were the furnishing of police and fire protection to the original construction work being performed by the defendants in the Island of Bermuda (Requests Nos. 2 and 3).

That as a matter of law the defendants are entitled to a judgment as to all the plaintiffs in this action based upon these material facts regarding which there is no genuine issue as will be seen more fully from the authorities cited in the defendants' memorandum of law in support of this motion, since the Fair Labor Standards Act of 1938 does not apply to employment in the Islands of Bermuda or the leased areas thereof, and since the employment of the

plaintiffs in affording police and fire protection to original construction was purely "local" and is not "in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 as amended.

Furthermore, as to the plaintiffs John Joseph Connell and David Joseph Townsend, whose depositions were heretofore taken on April 27th, 1946 the defendants are entitled to judgment based upon the admissions made by the said parties plaintiffs therein; it appearing from said admissions that the said Connell and Townsend were bona fide administrative and executive employees and as such exempt from the provisions of the Fair Labor Standards Act of 1938 as amended.

James Randall Creel.

(Sworn to the 3rd day of September, 1946.)

[fol. 29] In United States District Court

[Title omitted]

Deposition of David Joseph Townsend

Deposition held at the office of Eidlitz, French and Sullivan, 110 East 42nd Street, New York, N. Y., on April 27, 1946, at 10:00 A. M., pursuant to Notice dated April 12, 1946.

Appearances:

For the Plaintiffs: Jacob Bromberg, Esq., 225 Broadway, New York, N. Y.

For the Defendants: Eidlitz, French & Sullivan, 110 East 42nd Street, New York, N. Y. By Randall Creel, Esq., of Counsel.

[fol. 30] David Joseph Townsend having first been sworn before a Notary Public of the County of New York, State of New York, took the stand and testified as follows:

Direct examination.

By Mr. Creel:

Q. Please give your full name and address.

A. David Joseph Townsend, 57 West Main Street, Warren, Massachusetts.

Q. You are a plaintiff in this action?

A. That is correct.

Q. During what period of time were you in the employ of the Bermuda Base Contractors named Vermilya-Brown Company, Inc., Necaro Company, Inc., and The Arthur A. Johnson Corporation?

A. From December 6, 1941 until May, 1943, I believe it is May 12th.

Q. Where was the place of your employment? Where did you perform your duties?

A. In Bermuda.

Q. Were all of your duties performed in the Island of Bermuda?

A. In a sense, part of my duties were performed on a ship running from Bermuda—it was just for two days.

Q. Now, when and where was that, and what was the name of the ship?

A. That I am afraid I couldn't help you on. I don't remember the name of the ship. There was quite a few of the fellows coming back on that ship and they impressed a number of us into service during passage from Bermuda. It was just two days, but aside from those two days all our duties were in Bermuda.

Q. Well, what was the time when you performed this duty aboardship?

A. Well, as far as I am concerned, I don't remember the exact tours or watches that I stood—that is as a group. They picked out quite a few of us to guard various passageways and were formed into reliefs and whatnot.

Q. Well, what time?

A. During the entire period of our sailing.

[fol. 31] Q. When was this sailing? Was it when you were returning to the United States?

A. That's right.

Q. That is after your duties in Bermuda had terminated?

A. That is correct.

Q. And that would be at the end of your employment?

A. That's right.

Q. Do you remember the name of the ship?

A. No, I am afraid not.

Q. What duties did you perform aboard this ship which name you don't remember?

A. It was preventing the base workers from going into

restricted areas, preventing smoking in restricted areas, keeping them off decks at night. There were quite a few submarines at the time and protecting various parts of the ship, such as life preservers; see that none were taken in certain areas where they were supposed to be hanging, and also to prevent possible wars. You know, a good many of these fellows down there may have brought in some liquor and what not, and they were great ones for getting into difficulties; any difficulties like that were taken care of too, I mean, just to keep peace.

Q. You were performing patrolmen's duties? Policemen?

A. Yes, general police duties, yes.

Q. This was for a period of two days just at the end of your employment?

A. That is correct.

Q. Where had you been paid off? Your final payment?

A. In New York.

Q. After you arrived?

A. That is correct.

Q. You hadn't received final payment and signed releases in Bermuda?

A. No.

Q. You did sign a release?

A. I believe so, yes.

Q. Well, now, Mr. Townsend, will you describe fully and in detail just what duties it was that you performed at Bermuda?

A. Well, in Bermuda——

Q. First, what was your name? Give the title?

A. Well, to start with, I was a patrolman. After a few months I was promoted to Sergeant.

[fol. 32] Q. Now, will you tell us in detail the duties of a patrolman?

A. The duties of a patrolman were generally they were assigned to a post. They were to protect that post and all areas surrounding that post—a sort of a fire watch against possible drunks, fights and illnesses. Practically everything. It was purely police duties.

Q. You did no manual work, no construction work?

A. No, not actually.

Q. Or mechanical work?

A. No, except possibly on the car. They had two police cars. Occasionally minor repair was required, but that was

not a part of our duties and consequently it couldn't really be called manual labor.

Q. There were mechanics on the job to do that?

A. They had mechanics in what they call the Industrial Area that did make repairs, but our only duties were possibly blowouts or something, and we had to change tires. That was more or less a normal state of affairs.

Q. You do that just as a policeman would do that in the United States?

A. That's right.

Q. In making the repairs on his police car?

A. That's right.

Q. In so far as tires are concerned?

A. Tires, or just minor adjustments—carburetor or something. They had a good deal of trouble with the cars.

Q. Well, is it true, then, Mr. Townsend, that as patrolman your duties were purely police duties?

A. That's right.

Q. You do not contend that you performed any extra duties aside from police duties?

A. Well, I don't believe so. Picking up accident cases and so forth, that all comes pretty much under police duties. That is correct.

Mr. Creel: Off the record.

(Discussion off the record.)

[fol. 33] By Mr. Creel:

Q. Mr. Townsend, to the best of your knowledge and belief were the duties performed by the patrolmen, all duties which are performed by the police of the City or the Municipality?

A. That is correct, generally the duties were all the same, with one possible exception. For quite a while they did assign a patrolman to drive the car. Those were his only duties, was driving the police car.

Q. That was a police car that he drove?

A. That is correct. Then later they put a driver from the motor pool or whatever they call it as a driver for the police car. Quite frequently we drove it ourselves.

Q. The driving of the police car was in connection with police duties?

A. Yes, sir, with police duties, but aside from that it was strictly police duty in all respects.

Q. Now, where in the Island of Bermuda did you perform these duties? Were they all on the reservation or the so-called reservation which is now known as Kindley Field and Fort Bell, or were they performed outside the reservation in other parts of the City of Bermuda, of the Island of Bermuda?

A. They were performed outside the city. We had sort——

Q. (Interposing:) Outside the reservation?

A. That is correct. In Bermuda proper, that is British territory. We had a working agreement with the Bermuda police, the Bermuda Constabulary I believe they call it, whereby any base worker or American citizen got into some minor difficulty such as drunkenness or fighting or something that wasn't too serious we would go over there and pick them up or sometimes they would arrest them and turn them over to us. Of course, if it was anything of serious nature they would hold them for trial themselves, and on the same ground the Bermuda Constabulary came over on the base for Bermudians that happened to be working on [fol. 34] the base. It was just a little working agreement between us, so in that sense we did quite frequently perform duties outside the base, but it was all pertaining to the base.

Q. Well, now, were these posts to which you were assigned all located in the reservation or were some of these posts located outside the reservation in other portions of the Bermuda Island?

A. Well, they had a hospital that was actually in Bermuda territory. We did have a post over there taking care of the drunks—we call them D.T.'s and mental cases and whatnot. That was in I believe, it was an ex-inn or a small hotel or something that was taken over by the Army Engineers as a hospital. We had a post there quite frequently.

Q. What was the number of that post?

A. I believe they just called it the hospital post. You see, it wasn't a permanent post. It was only when they actually required them there.

Q. These posts had a number?

A. The majority of them did, yes.

Q. And they also had a shanty, didn't they?

A. Not necessarily. A couple of them did, but they did put up a little shanty, oh, several months before we left,

just a small square box. It was a shelter of sorts but part of that time there were no shelters other than possibly in the doorway of a building if it was really nasty.

Q. Well, what other posts were there off of the reservation?

A. Then, the other one was at the Hotel St. George and that had been taken over by the Army Engineers for the Engineers' staffs and office workers and whatnot. We had a post around that and inside that hotel. That was in St. George in Bermuda.

Q. And these posts each carried a certain area with it?

A. That is correct.

Q. And the duties performed by the man assigned to the post were comparable to the policeman on a beat?

A. That is correct.

[fol. 35] Q. Did any of these posts include the dock at Hamilton?

A. They did have a temporary post down there. Occasionally when a ship arrived they would send a full detail—one or two men down to just sort of clear the decks to take care of Bermudian base property rather, and partly to receive base workers. When a ship came in at Hamilton they had to assign them to cars and that line train they had.

Q. Do you know the number of that post?

A. They had no number on there. It was a special post merely for such occasions. There was no regular post there.

Q. Didn't you have a regular post, a numbered post at the docks in St. George?

A. No, we had no actual post ourselves, although we did have Bermudian watchmen on the docks in St. George and we were in direct charge of them and had to go over there.

Incidentally, that was another part of our duties outside of the base property. The sergeants did have to check their watchmen and we drove right through the docks and in St. George.

Q. And these watchmen were Bermudians? Citizens?

A. Yes.

Q. But you had no post on the docks?

A. Other than those watchmen we had no actual police posts of our own.

Q. Did you or any other patrolman have any part in the unloading of any ships?

A. Only in a protective capacity mostly for the base workers coming in, as I just explained, coming in and being

turned over to the cars and so forth, and also in loading ships we quite frequently saw that the men got on some of them—they had been celebrating and whatnot. We went over there and put them aboard ships and so forth and stood by until the ships sailed, but that was a special duty to no numbered post or regular post.

Q. What percentage of your time was taken up by performing police duties in connection with the escorting of drunks off of or on to ships?

A. Well, comparably little. It would be hard to give any [fol. 36] percentage. We used to take them down from either the base, quite frequently we would lock them up for safekeeping or from the hospital, and take them down to the ship just prior to sailing and stand by until they sailed—probably not more than perhaps an hour and a half or two hours at the most on any given ship, and just prior to its sailing, as soon as the ship sailed before they pulled in the gangplank, why, our duties were finished.

Q. Well, in this caring for drunken personnel would you perform any duties other than a police officer or a patrolman would perform in a city in taking care of a drunk?

A. I don't believe so, no. There is a possibility, of course, that we were sending these drunks out—we locked them up and then sent them home. Looking them up, of course, would be performed in any city, but I don't know if a police officer would send them or see that they got home properly.

Q. Have you never seen a police officer start somebody home or take him home?

A. Well, they might put him in a cab, but once they are arrested as a D.T. or just an habitual sot usually when they sober them up or turn them loose—but that is a minor point and doesn't really matter.

Q. Now, you worked a seven-day week?

A. That is correct.

Q. You worked a nine-hour day?

A. That's right.

Q. You received time and a half pay for all hours over fifty-six, didn't you?

A. Hour over fifty-six?

Q. That is hours a week over fifty-six?

Mr. Bromberg: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. Is this correct? You and other patrolmen worked each week fifty-six hours a week?

A. That is correct.

Q. At a salary of a dollar an hour?

A. That's right.

Q. And for all time worked over fifty-six hours a week you received time and a half?

[fol. 37] A. Well, I wouldn't say that because quite frequently we were more or less on call—I mean at all hours over fifty-six we received time and a half for that extra hour over fifty-six, but sometimes we were called on special duties and whatnot at all hours of the day and night. But actually the answer is yes to that question. All hours over fifty-six we were paid time and a half for overtime.

Mr. Creel: Off the record.

(Discussion off the record.)

Mr. Creel: It is stipulated by Mr. Bromberg that no claim will be made in this case for any hours worked over sixty-three per week.

Mr. Bromberg: That is right and the plaintiffs all concede that they were paid time and a half for all hours over fifty-six hours per week up to sixty-three hours per week.

By Mr. Creel:

Q. It is also true that on holidays such as the Fourth of July, George Washington's Birthday, Armistice Day, Thanksgiving Day, Christmas, New Years and other legal holidays you received double time?

A. That is correct, for national holidays.

Q. That was double time, not only overtime but double time regular time?

A. That's right.

Mr. Creel: Computed on the basis of a fifty-six-hour week.

Mr. Bromberg: That's right.

By Mr. Creel:

Q. It is true, Mr. Townsend, that all patrolmen and their officers were employed on a fifty-six-hour week, is it not?

A. That's right.

[fol. 38] Mr. Bromberg: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. You were promoted from a policeman, weren't you, or a patrolman?

A. That is correct.

Q. When was that?

A. I don't remember the exact date, but I have brought along my report book and I think that there might be an indication there.

Q. Were you promoted about the 18th of July, 1942?

A. That is correct. I was just going to say that, about the 18th.

Q. From that time forward you were paid at a different rate?

A. That's right.

Q. What was that rate?

A. I don't recall the exact rate.

Mr. Creel: Off the record.

(Discussion off the record.)

A. (Continuing:) $64 plus 5½ for the extra seven hours between fifty-six hours and sixty-three hours per week.

Q. Is that correct?

A. That is correct.

Q. What was the title when you were promoted?

A. My title was changed from patrolman sergeant-of-police.

Q. Now, what were your duties as sergeant-of-police?

A. As sergeant-of-police I posted men, patrolmen, answered various calls, riots, fires or disorders, and checked posts and watchmen, that is patrolmen and watchmen and took charge of various small details taking care of riots or something of the sort. Generally that was all. Other than that my duties were usually in the station house waiting for something to come up.

Q. Who was your immediate superior?

A. My immediate superior was Captain Reynolds.

[fol. 39] Q. Who was Captain of the police force?

A. That's right

Q. He would not come on duty all twenty-four hours a day?

A. No.

Q. The time of the police force was broken off into three quarters wasn't it?

A. That's right.

Q. Sometimes you would be in charge of Squad 1, sometimes of Squad 2, and sometimes of Squad 3?

A. That's right. Three reliefs.

Q. And the twenty-four hours was divided between these three squads?

A. That's right.

Q. You had no particular period of time that you were always in charge of?

A. No, it changed weekly. It rotated.

Q. During the time that you were acting as a sergeant in charge of a squad, you would be in control of that squad, wouldn't you?

A. That is correct.

Q. You would supervise the patrolmen in the performance of their duties?

A. Absolutely.

Q. Now, approximately how many patrolmen were there?

A. Well, that fluctuated too. At times I believe the greatest number of patrolmen on each squad was about eighteen or twenty, I am not certain of the number.

Q. You would assign patrolmen to their posts?

A. Yes, sir.

Q. And you would supervise their work and watch them?

A. That's correct.

Q. If you found that a patrolman was derelict in his duties you would report him?

A. Or take him off post and bring him in. That is correct.

Q. If you found that a man was particularly good, you would recommend him?

A. That's right.

Q. Would you have anything to do with recommending that a person found to be inefficient be discharged?

A. Yes, sir, I mean a recommendation only. I had nothing beyond that.

Q. Would you have power to recommend a man that was [fol. 40] particularly good be given recognition and promoted?

A. Yes.

Q. Now, in addition to supervising these eighteen police, eighteen to twenty patrolmen, you would also supervise the work of the locally employed watchmen?

A. That's right.

Q. Approximately on each relief no more than seven or eight I guess. Off the record.

(Discussion off the record.)

Q. Would you say between six——

A. (Interposing:) Oh, six, and perhaps ten. As a matter of fact it was probably much closer to ten.

Q. And you would supervise there the work of the watchmen?

A. That's right.

Q. Now, just how would you supervise it?

A. Merely by giving them instructions on various special duties or new duties or re-assign them to the posts or just checking to see that they were on duty.

Q. And when on duty you would be in your central headquarters, Police Headquarters?

A. Either there or patroling the various posts that is going around and checking them in.

Q. At the central headquarters you would receive reports if reports were to be made?

A. That's right.

Q. Did you have any assistants when you were acting as Supervising Sergeant?

A. There was one man on duty in the station in Headquarters in the event that I was called away—his regular post there. Of course, during the day time Captain Reynolds and the Lieutenant were on duty during the days. They normally left in the afternoon and four to twelve and twelve to eight watches—that is the reliefs—the Sergeant was in charge, in complete charge. If anything extraordinary came up he would call the Captain. He lived down there.

Q. You would perform your duties as supervisor during [fol. 41] the day under their general——

A. (Interposing:) Subject to the Captain or Lieutenant.

Q. Subject to his general supervision?

A. That is correct.

Q. But at night?

A. We were in complete charge of all police duties.

Q. Now, were any of your duties as sergeant or as patrolman, were they manual duties? Were they mechanical duties or the duties of the laborers?

A. No.

Q. What was your responsibility as sergeant-of-police?

A. Well, I was responsible for the conduct of the men in that particular relief, or for that matter responsible for all things pertaining to police duties. If there were a riot; for example, and it was not taken care of, I was directly responsible. If someone were injured in an accident and that was part of my duty I was directly responsible if that wasn't taken care of.

Q. You were more or less the acting Police Chief?

A. During my tour of duty. That is correct, except, of course, during the day time when the Captain or Lieutenant were there, but even then I was primarily responsible.

Q. You have had some training for this type of duty, and experience, have you not?

A. To a certain extent, yes.

Q. What has that been?

A. I worked as a store detective in different places—Macy's and Gimbel's and so forth; as a prison guard in the Naval Prison, at Portsmouth and—well, I guess that would be about it.

Q. You had also performed police duty for the Irving Trust Company?

A. Oh, that's right. Yes.

Q. Well, when on duty you were, that is as supervising sergeant you had a position where you had to exercise considerable discretion and judgment, did you not?

A. I believe so, yes.

Q. Could you spell that out as to just where you were called upon in your duties as sergeant to exercise discretion or judgment?

A. Well, in some respects pertaining to—well, drunks, for example. There are several types of drunks. Some of [fol. 42] them—it was just a knowledge of the type as to just what disposition would be made of him, for example. Some of them were just no hope—we had to lock them up. As to others, quite frequently you were able to reason with them and even drunk as they were see that they got to bed and kept quiet and sort of took things easily generally. That was part of your discretion. Then a riot for example—judgment and discretion played a very important part in breaking them up. That just offhand is I think about all I can think of.

Mr. Creel: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. Suppose that you were at Headquarters and a call or a report would come in, would it require the exercise of judgment and discretion to determine whether that was an alarmist call or whether that required action?

A. Whether or not it was an alarmist call, it was usually taken care of. I went down on all calls, regardless. Now and then, in fact quite frequently there was alarmist calls in that some drunk would come in, just make a little noise and it would be reported as a riot or something, but I went down on all calls.

Mr. Creel: Off the record.

(Discussion off the record.)

Cross-examination.

By Mr. Bromberg:

Q. Mr. Townsend, in answering the questions just propounded to you, covering your duties, you talked about police work connected with human beings on this job. Will you please describe in what way your duties covered the materials and equipment that was located in the Bermuda [fol. 43] base at the time you worked there?

A. Well, we were responsible for all things pertaining to the base—material, equipment, buildings and the property itself. In fact, we were responsible for the protection against fire, theft or anything else.

Q. Now, were all these materials that you were responsible for materials used at the Bermuda base only or were they used in other locations also to your knowledge?

A. Well, most materials that came down there were used right at the Bermuda base. Some equipment, of course, was sent off to other places. I couldn't say where.

Q. Was it part of your duties and the duties of the other police officers to supervise or guard the loading of materials and equipment either aboardship or taking this material and equipment off the ships?

A. Well, no. That would come under more the watchmen. The watchmen were directly responsible for all things on the dock whether being loaded or unloaded. We, of course, exercised supervision of the watchmen, but as far as having actual patrolmen on duty on the dock, I don't recall any incident.

Q. Was it part of your duties and the duties of other police officers to supervise or instruct the watchmen that did guard these materials and equipment which were being loaded or unloaded on the docks?

A. Yes, we were in direct charge of the watchmen in supervision, giving of orders of different duties and so forth.

Q. Can you give us any specific instances of occasions where either materials or equipment was removed from the Bermuda base aboardship to be shipped elsewhere?

A. Well, certain piece- of equipment were off the base or crated up or otherwise prepared for transportation and removed from the base. Just what happened to them I couldn't say. I never followed them particularly. We were responsible for all equipment on the base, and for that matter on the docks, but any specific piece of equipment, I am afraid I couldn't help on.

Mr. Bromberg: That is all.

[fol. 44] Redirect examination.

By Mr. Creel:

Q. Mr. Townsend, it is true that the Bermuda Base Contractors had a supply department, is it not?

A. I believe so. Yes.

Q. And it is true, is it not, that that supply department was primarily charged with the receipt and shipment of all materials, equipment and supplies?

A. That is correct.

Q. It was charged with the warehousing, the checking and the use of such materials, equipment and supplies?

A. Yes, sir.

Q. Now, it is also true, is it not, that the patrolmen and their officers in connection with material, equipment and supplies performed purely police duties?

A. That's right. Protection against damage or theft.

Q. Did you or any other policemen have anything to do with the shipping out of any equipment, material or supplies?

A. Not at all, except police supervision.

Q. And is the statement true of the receipt of materials, equipment and supplies?

A. The same is true.

Q. Your only connection was that of furnishing police protection?

A. That is correct.

Q. Now, when materials were arriving isn't it a fact that the supply department was in complete control?

A. That is right.

Q. Isn't it a fact that no police officer would be assigned to the dock for the receipt of material while the ship was being unloaded?

A. I don't remember any specific incident. I don't believe they were. There might have been an odd one in there—that watchmen were in charge of the dock, I mean.

Q. Isn't it a fact that the watchmen were assigned to the dock only when the loading ceased and the stevedores were taken off the dock?

A. No, not necessarily. They had regular duties, tours of duties and were on that duty whether or not there was a [fol. 45] ship there. Their duties consisted of fire protection too.

Q. Well, isn't it a fact that most of these ships were unloaded during the daylight hours?

A. The majority, though some of them they did put floodlights on. That didn't make too much difference.

Q. Well, isn't it a fact that the watchmen were not on duty during daylight hours but only in the night hours?

A. Frankly, I don't remember. I know some of the watchmen were relieved. That is, they had no daylight hours, tours, but I believe one or two of them did. Whether they were on the docks I don't remember just at the moment, but generally they were on night watches.

(Whereupon, this witness was excused.)

(Subscribed and sworn to by David Joseph Townsend this 19th day of August, 1946.) Sol L. Firstenberg, Attorney and Counsellor-at-Law, Residing in Queens County, Office & P. O. Address: 225 Broadway, N. Y. C. Queens Co. Clk's No. 32, Reg. No. A-150-F-7, New York Co. Clk's No. 31, Reg. No. A-643-F-7, Kings Co. Clk's No. 49, Reg. No. A-412-F-7, Term expires March 30, 1947.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION OF JOHN JOSEPH CONNELL

JOHN JOSEPH CONNELL, having first been sworn before a Notary Public of the County of New York, State of New York, took the stand and testified as follows:

Direct examination.

By Mr. Creel:

Q. What is your address?

A. 1674—71st Street, Brooklyn, New York.

Q. You are a plaintiff in this action?

A. Yes, sir.

Q. During what period of time, Mr. Connell, were you employed by the Bermuda Base Contractors?

A. I left New York September the 6th, 1941 and arrived in Baltimore back April 30, 1943.

Q. Now, where were your duties performed?

A. Mine? When I got down in St. David Island I was assigned to the ship "Berkshire".

[fol. 47] Q. What was the ship "Berkshire"?

A. It was the sleeping quarters, cooking quarters, all the material was stored there—perishable material and everything—water, fresh water and everything out there, so we watched it. There was over five hundred people sleeping on it and it was all frame.

Q. It was used as a dormitory?

A. Sleeping quarters, dormitory.

Q. Or barracks?

A. Barracks.

Q. Now, what were the duties that you performed at Bermuda?

A. Well, I was hired here in New York for forty-eight hours a week, $56 per week. That is what I was hired for.

Q. What duties were you to perform was the question.

A. Fire patrolman, to extinguish any fire, look out for hazards and report them, and take care of the fire apparatus; fill up the lamps with kerosene oil during the day to have light and light them at night and extinguish them in the morning.

Q. All these duties were performed in the Island of Bermuda?

A. Bermuda, and fill extinguishers, find any of them knocked over or broke—report them.

Q. You have been a fireman and had lots of experience?

A. Yes, I had twenty-eight years of it.

Q. Quite a lot of training as a fireman, haven't you?

A. Oh, yes.

Q. And is it true, Mr. Connell, that the duties that you performed at Bermuda were typical of the duties performed by firemen?

A. Firemen in a fire house.

Q. In the City of New York?

A. In the City of New York—outside going out and cleaning lamps and filling them and going out in the fields and filling extinguishers.

Q. Well, that is typical of the duties performed.

A. In New York you did it in the house.

Q. (Continuing:) Of firemen in our Municipal Fire Force?

A. Yes, here going outside to do it. We had to go out [fol. 48] through the section, carry kerosene oil and fill them up, clean the lamps and light them.

Mr. Creel: Off the record.

(Discussion off the record.)

A. (Continuing:) Well, the duties in Bermuda were very near the same as the duties for a fireman in New York City, except we had to go outside to fill fire extinguishers and report any of them that were broken. We had to fill red lamps—we had red lamps hung on every section where there was fire extinguishers at night time throughout the island where the material was stored. We had to fill them and see that they were kept lit all during the night, and if any hurricane was reported we had to go out and put them out. Not a hurricane, but they were afraid of a raid—we had to go out and put all the lights out. That is what we had to do at night time.

Q. Now, were the duties performed on that area known as the reservation, namely, Kindley Field, at Fort Bell, or were they performed in other parts of the Island of Bermuda?

A. Well, in St. David's Island—now, I have them by

name. Saunder City, Poole City, White City, the Industrial Area, Berkshire, Long Bird, and we had a crash wagon in the field where all the planes that was coming in.

Q. And all this was performed in the reservation?

A. In the reservation. Then, we had to go over to the other side of St. George on the hill there and they have fire extinguishers there—fifty-gallon portable extinguishers. We even had to go to St. George's Hotel to put a fire out one night.

I believe I was outside of the reservation part of the time.

Q. Well, now, you have referred to the fact that you were employed for a forty-eight hour week?

A. Forty-eight hours a week.

Q. Mr. Connell, I show you a directive signed by the Lieutenant Colonel D. G. White, the Corps of Engineers, in [fol. 49] which he specifies the salary for firemen and lieutenants among others, and he says that salaries are based on a fifty-six hour week with time and half for overtime. A copy of this——

A. (Interposing): This is in 1942.

Q. (Continuing): A copy of this was sent to Lieutenant Walsh of the Fire Department under——

A. (Interposing:) December 31st.

Q. (Continuing:) —of 1941, in which it says that inasmuch as your working week now comprises fifty-six hours this will mean that your force will work sixty-three hours per week and all men in your department will be paid time and a half for the additional seven hours of work.

Q. Did you ever see this?

A. Yes, I saw this, but we had a different one. You see, I was four months on forty-eight hours a week. You see, I went down in September—September, October, November and December, forty-eight hours a week we worked. Well, two of our fellows quit. One quit right away, so we had only a few men, so we were all quitting. We wouldn't work for that money, so they gave us the extra dollar and a half and that put us over on the other day which we asked to be paid for and we would ask Mr. Saunders—a couple of us went to Mr. Saunders. We went to Mr. Glenn and they were to take it up with Colonel White, but nobody ever paid any attention to it.

Mr. Creel: Off the record.

(Discussion off the record.)

By Mr. Creel:

Q. It is your contention, then, Mr. Connell, that at the time you were employed you were given a mimeographed sheet?

A. Yes, sir.

Q. Which said that you were to work forty-eight hours a week?

A. Forty-eight hours a week.

[fol. 50] Q. That mimeographed sheet wasn't a part of your contract, was it?

A. It was all given to us the same time.

Q. Well, is it a part of your signed contract?

A. Here?

Q. Here is a signed contract.

A. I don't know. I didn't even look at that.

Mr. Bromberg: Counsel for the plaintiff stipulates that this particular mimeographed sheet referred to was a separate sheet of instructions handed by the employment agent who hired these men to them at the time that they executed their respective contracts, and it is admitted that there are no signatures on this mimeographed sheet—merely instructions stating hours of work and instructions as to the conduct of the employees at the base and means and methods of cashing their pay checks.

In some instances some of these mimeographed sheets had a pencil or ink line through the Arabic numerals 48 and 56 written over them. In some instances the Arabic numerals 48 was unchanged.

By Mr. Creel:

Q. Well, Mr. Connell, you have seen this directive from Colonel White and the letter from the Bermuda Contractors, a copy of which went to Lieutenant Walsh of the Fire Department?

A. Yes.

Q. Do you remember approximately when it was that you saw that?

A. Oh, we had no office, he just had his bedroom office.

Q. Well, do you remember when?

A. Well, I must have seen it maybe in January.

Q. 1942?

A. 1942.

Q. So that from that time on you knew that you were on a fifty-six-hour week?

A. Yes.

Q. And time and a half for overtime?

A. We went to see Mr. Saunders about it and they were [fol. 51] to take it up. When we got the extra hour we all started to kick. Well, everybody was saying, "Well, we will take it up, we will see what to do." And nobody paid any attention to us.

Q. Well, some time after, approximately January 1st of 1942 you were paid on a fifty-six-hour week with time and a half for the seven hours over the fifty-six?

A. Yes.

Q. Now, you have described pretty fully the duties which you performed as a fireman. Is there anything more we should know about the duties of the other firemen?

A. Well, I was promoted.

Q. Well, we get to that.

A. Well, the other firemen as well.

Q. They performed pretty much the same kind of duties?

A. Well, everyone had a different section, like some of them had barracks. Now, in some sections we could afford six men, we had six men placed at one barracks like Saunder City. Well, they had to patrol in twos in three different shifts. They had to patrol in twos all night or all day and examine everything and report anything that was serious to the Captain; make reports of it.

Q. You mean by way of fire hazards?

A. Fire hazards or dangers like, you know, we had to report everything to the Safety Engineer in regard to people getting hurt. Several places there would be holes without no lights—people coming along and at night walking into holes. We used to have to report that to the Safety Engineer, so we used to do everything we thought was necessary to protect life.

Q. Now, any fires we had we reported them. Now, the only one serious fire we had down there was about the 9th or 10th of September, 1941. Outside that we never had a serious fire. All little ones confined to the starting point.

Q. You had regular fire equipment in the fire house?

A. We had no fire house. We had equipment throughout the section, like we had a pumper, these pumpers had to be [fol. 52] taken—we used to have to get a wagon, a truck

and certain trucks were made to hook up the pumper to in the back and pump water to any place that there was a fire. That was the first time, but after a little time we had fire hydrants and everything down there, but these pumpers had to be kept in condition and we had to have them cleaned and every day we gave instructions to some of the men that were working down there, how to operate them.

Now, we reported all fires so anybody, any drunks that set bedrooms on fire, all the damage was charged up to the drunk like he burned his mattress and bedclothes—he paid all.

Q. All right. We have that.

A. The record of that I guess you got.

Q. Well, now, did you perform any extra duties other than those of fireman while you were there?

A. Oh, yes, we had to help in riots and we had to help in clearing out ships when we had hurricane orders, when the flag went up, we had to get the ship cleared out and had the "Berkshire"—we had to have that cleared away—if everybody was sleeping there put off, loosen the lines and have everything ready in case the hurricane came.

You know, several times we had signs of hurricanes, but they never showed up.

Then in the barracks where everybody would be living and sleeping we had to get them all out of there and out—you know, in case if the hurricane came. That was extra. We never looked for any pay for that.

Every fire that was there we reported, every one was reported.

Q. Now, did you perform any duties other than these duties in connection with the clearing out of the barracks ship when hurricane warnings came?

A. No, no, only to keep our apparatus in condition.

Q. Did you or your firemen perform any mechanical or manual work in the construction of the project?

[fol. 53] A. No, only in the apparatus. Now, we had a 1000-gallon tank was there—we had operated a truck—you know, in case there was a fire any place that we had no water. Now, we had to operate that truck ourselves.

Q. You would keep your fire equipment including this tank or truck?

A. This wouldn't be a fire equipment, but we placed it there in the evening there for us to operate. We would

have to take wherever there would — a fire and use that thousand gallons of water.

Q. This was mounted on a fire truck?

A. Yes—well, we have to fill it up again.

Q. Well, that was a part of your fire equipment, wasn't it?

A. Well, it was part in a way, you see, but still it was work, a lot of work to it.

All I did was perform fire patrol, put out any fires and reported any hazards and made reports of everything that occurred during my tour of duty and the records is kept of that. All fire apparatus and equipment was kept ready for immediate use, all lights in the outlying section, oil, cleaned and lit at night time and put out in the morning; and all appliances on the outside right at the base was kept in condition too; like out in Fort Bell we had portable fire extinguishers there. We had to go down there and examine them and have them filled and have them repaired.

Q. Well, now, Mr. Connell, you must have done very well down there because there came a time when you got a promotion.

A. Well, I stayed on the job. It was very hard, you know, I was brought up—I had a lot of good eats out here and when I went down there I was short of water.

Q. We were talking about the promotion, Mr. Connell. You did get a promotion, didn't you?

A. I was promoted July 14th.

Q. And what were you promoted to?

A. But it took effect on the 19th. I didn't get paid from the 14th to the 19th. The 19th I think the pay started. I was made a Lieutenant.

Q. You were Lieutenant of the Fire Department?

A. Yes.

[fol. 54] Q. You were Lieutenant in charge, weren't you?

A. At night time.

Q. You had quite a lot of experience as a fireman, hadn't you?

A. Yes, sir.

Q. When was it you joined the New York City Fire Department?

A. July 1, 1913.

Q. And you had been——

A. (Interposing:) A firemen until June 11, 1941. Twenty-eight years except for a couple of days.

Q. Well, what experience, training and what ranks did you hold in the New York City Fire Department?

A. Well, I was assigned a fireman but not extinguishing fires. Then I was taken over by a Chief to assist him as Chief's Aide. I did clerical work and I carried out his orders to the companies no matter where they were in the buildings. I assisted him, and before I got out I was a Building Inspector. My chief was put out and so I went back as a Building Inspector for a couple of years, and then I retired.

Q. You had very extensive experience in the New York City Fire Department, did you not?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, when you became Lieutenant in charge of the Fire Department on the Bermuda base you got an increase of salary?

A. Yes, I got $90.25 a week.

Q. Your base salary was increased to about $76 and then you got overtime?

A. I received $76 per week as a Lieutenant plus time and a half for overtime between fifty-six hours per week and sixty-three hours per week, making a total of $90.25 a week which I received. We are not looking for any money that we were held on at all hours of the night and day to answer any alarms when we were not assigned to our posts.

Mr. Creel: It is stipulated by Mr. Bromberg that all firemen will not seek any compensation for hours worked per week over sixty-three.

[fol. 55] Mr. Bromberg: It is stipulated by Mr. Bromberg, as attorney for the plaintiffs, that no claim will be made by the firemen plaintiffs for compensation for the time they were required to stay on the base and be subject to emergency call, and that they will only demand compensation for those hours actually worked under an assignment.

By Mr. Creel:

Q. Now, as Lieutenant in charge, what were your duties?

A. Well, we had——

Q. (Interposing) First, who was your superior?

A. Captain Walsh.

Q. Were you in charge of a section or were you in charge of all sections?

A. All sections for the tour of duty.

Q. You were in direct charge under Captain Walsh?

A. Captain Walsh.

Q. Your Fire Department was broken into three sections?

A. Oh, no.

Q. I mean your tours of duty?

A. Yes, three sections.

Q. You were in three sections, weren't you?

A. No, there would be another man in charge. Now, I would go to work at 11 o'clock and stay on maybe to nine in the morning; from eleven to eight or from twelve to nine, whatever way, and there would be another man in charge and another man in charge. There were three Lieutenants and a Captain. There was one Lieutenant and a Captain working in the day tour.

We had a small truck with hose in it and we carried it, all appliances on it—you know, for fixing different things. Then, with that truck we visited all the sections. We went around to all sections and made inspections all hours during the night.

Q. Now who was in charge of the Fire Department?

A. I was, when I would be working in the night tour.

[fol. 56] Q. And your immediate superior was Captain Walsh?

A. Yes.

Q. Now, there were two other Fire Lieutenants?

A. Yes.

Q. Were you always in charge of the night tour?

A. I was always working night tours.

Q. And the other two Lieutenants would split the other two?

A. No, one of them worked from four to twelve, one of them was assigned day tour with the Captain, one of them worked four to twelve. I would work twelve to eight.

Q. Well, now, in the night tour you were always in charge?

A. I was always in charge.

Q. Captain Walsh would be off duty then?

A. He would be right in his quarters if I needed him to report anything to him.

Q. How many men did you have under your supervision?

A. Well, I used to have two in each section—that would be, I had six sections.

Q. You would have twelve men?

A. I would have twelve men, sometimes thirteen.

Q. Now, what would your duties be as Lieutenant in connection with these six sections?

A. Well, you see, I would be around in the car and I wouldn't tell them when I was coming,—you know, so I walked around the section to supervise them, see if they were on the post, well, I would visit that three and four times a night until morning, see whether they were on post all the time, see that nothing was wrong because there may be a little fire in the outlying section and I would have to bring a couple of men out there to put it out. Like we had a dump there, you know, regularly it would go on fire and the barracks was right across from us, you know, and they they would call up to know what was on fire and so we would have to stretch hose to put out the dumps.

Q. Your duties would be primarily to supervise the men that were under you in the various sections?

A. Yes.

Q. Would you have the power to recommend that men [fol. 57] under you that did good work get promoted?

A. Well, I made all my reports to the Captain on it, see?

Q. Well, would you in these reports ever recommend or censure a man or recommend a man?

A. No, I didn't do it, because the Captain knew his good men and he knew who weren't good. The Captain knew every one. He knew them for years, and who did their duty down there. I recommended them all the time as being good men, but I never made any false reports, because they all were on the job.

Q. Well, now, if you found a man neglecting his duty would it have been your duty to report him?

A. Well, it would.

Q. Did you ever have to report any man?

A. Well, I might. I didn't find any of them asleep, but if I thought they were sleeping or just waked up I might give them a calling.

Q. Did you ever have to report a man?

A. No, I never had to report anybody.

Q. You never did report anybody?

A. No, I reported some that I had a little trouble with. I made a report to Mr. Saunders when the Captain was away, some of them, you know—one of them wasn't taking orders from me, so I reported him to Mr. Saunders.

Q. What action was taken on your report?

A. Well, the Captain was back in the city and that time the other Lieutenant Brower was in charge so he referred it to Lieutenant Brower so it was all squashed, the fellow obeyed me after that.

Q. Now, what were your resposibilities when you were in charge of this night section?

A. I was responsible for all the fires, if there was any fires, for reporting the same and reporting anything that was wrong during the night. I would make a report, every morning I put it under the door in the Captain's room. I turned a report every morning in there.

[fol. 58] Q. Well, now, that requires the exercise of considerable judgment and discretion, didn't it?

A. Well, you had to go around—you know, fire duty. I was brought up to put out fires, you know, and any place that was hazards I knew all about them, you know, and I inspected them places often.

Q. Well, could one of the workmen down there perform your duties without your training and your knowledge and your judgment?

A. No.

Q. This would have required special training and knowledge?

A. Because there is extinguishers there that you had to know how to use, you know. C. O. 2 extinguishers, what to use them on, and Pyrene extinguishers, what to use them on, different things, you know. Now, we had different things like that, you know. You had to be a fireman and know how to use them because C. O. 2 is dangerous if you open it up and hit somebody with it, it would burn you the same as fire.

Q. Well, if a fire got started would it require some judgment and discretion as to know how to go about putting it out?

A. Oh, yes. You would have to know what kind of apparatus you would need, you would have to know whether you get the pumpers or the portable extinguishers or what

you would get there, or the thousand-gallon tank, to get that there. Maybe that would be able to put it out, and then you get the pumpers brought up there and pumpers brought down to the ocean and stretched from there. It depends. Now, look, when we had a fire in the barracks we had to protect the other barracks. We have to have lines there stretched for the other barracks that they don't go on fire.

Q. Did you have any assistants when you were in charge of the fire section at night?

A. Only the Captain, he was always there in the section.

Q. Well, he of course was your immediate superior?

A. Yes, but any time anything went wrong I went in to him, woke him up or any telephone calls or anything wrong I would bring him with me. You see, we were on duty all [fol. 59] the time. No matter when anything was wrong everybody would be notified and we had to report. That is the reason they didn't allow us to live off St. David Island.

Q. Didn't you live at the St. George Hotel?

A. Oh, no. I couldn't get off the island. I had to live right in the "Berkshire". I lived the whole twenty months in the "Berkshire". Some of them got so nervous, you see, that they begged the Captain—they had to go home because you could not sleep in the day time or night time in the "Berkshire" half the time.

Q. Now, would you instruct your men how to do their job, make recommendations as to what equipment to use, and how to go about their job?

A. Well, they all knew it, they were all retired firemen. They had the whole thing there. They knew how, they all knew where to start the water, to stretch and everything else, they were all retired firemen so they all knew what to do.

Q. Would you ever make any recommendation as to the equipment that was to be obtained?

A. Well, no. That was up to the Captain.

Q. Now, you had how many sections under you?

A. Well, we had Saunder City—no, Poole City. Then we had White City, then we had Long Bird, the Industrial Area and the "Berkshire". That is where the men were assigned; we had the fields, the crash wagon in the fields, and the planes coming in and leaving, in the day time.

Q. Now, at night when you were to assign your men to these various stations or sections it would be you who would assign them?

A. No, the Captain had assigned six men in each section. They had to sleep and live there. Now, in Saunder City when we had that amount of men there would be six men assigned there. They slept there, they didn't leave there at all. That would be two in each group, you know. Poole City, the same way. White City, the same way. They didn't move around at all. They stayed in that section. In the "Berkshire", the same way, Industrial Area, and [fol. 60] where they had to guard that section. He assigned every one of them. Men worked and they changed around in different groups in sections at night time like they worked one—seven days at eight o'clock, another day twelve o'clock, another day four.

Q. You didn't set their watches then?

A. No, they did it themselves. The Captain did it.

Q. The Captain did it?

A. Yes.

Q. And your duties would then be to do what as Lieutenant in charge?

A. Well, I would go out when I would make an inspection, I would put every one of their names and numbers down, see? And I would go and see that every one of them was in the job. Well, then, when the Government checker went around he always came to me last and we would re-check to see if he had gotten the right numbers, see? So they were always checked on the job.

The Government checker went out during the night. You would never know when he was coming—any time from one o'clock to six o'clock in the morning. He went around to every section and he checked them on the job.

Q. That was a time checker?

A. The time checker.

Q. But your duties were to supervise the various men in the sections, under you?

A. To stay on their posts.

Q. Did you have any central place where you would receive notice or call of a fire?

A. Yes, at the Industrial Area. There was barracks there. They used to call it the White Collar Barracks. There was barracks there. The Captain had the telephone. He had a telephone in there.

Q. Would that be your station and post of duty when you were in charge at night?

A. Well, I would be right outside on the street. The wagon would be there, because if any of them found a fire or anything he would call up that telephone, the Captain would get it. He would come right out and we would pick up a couple more men and we would go to that section, we would pick up all the men we could to go there. They would [fol. 61] notify him on the phone. That was the only phone there at night time.

Q. If it were at night would they notify him or would they notify you?

A. They would notify him because I would be stationed around there when I wasn't out making supervision out around, supervising the men.

Q. Could a regular run-of-the-mill employee down there have performed your work without your special training and instructions?

A. No, we had two young fellows assigned to us in the day time as chauffeurs and helpers. Both of them was $90 a week boys—nineteen and twenty-one—$90 a week as Euclid drivers—them big Euclids. They used to call them Uke drivers—big trucks. They were $90 a week. They were assisting us there until we got some firemen down there.

Q. Did you instruct these men how to perform their duties?

A. Yes, how to fill extinguishers, operate everything, and we broke in a lot of men there—you know, but they were going back just as fast as we broke them in how to assist us, how to start the pumps, how to draft water, how to use the lines and everything else. We did the same, we had fire drills in the "Berkshire", got them out all hours of the night to see if they could get out in case of fire.

Q. Captain Walsh, he would be asleep at night time? He was on duty at the day time?

A. Yes, sir. Well, he used to be out supervising too, you know, but night time—many a night any hour of the night he would walk out, get out of bed and walk out with me, and say, "Come on, we will take a drive around." You never know when he come out of his room and say, "All right, we are making an inspection, look around and see how everything is." He stayed on duty all the time.

Q. Well, he slept at night, didn't he? You were in charge at night, weren't you?

A. Yes, but you never know when he walked out of his room. You could figure that he would walk out of his room any minute.

[fol. 62] Q. At night who was supervising, was it you or was it the Captain?

A. Me, and in case anything was wrong I would notify the Captain.

Cross-examination.

By Mr. Bromberg:

Q. Mr. Connell, what were your duties and the duties of the firemen employed by the Bermuda Base Contractors with respect to the materials and equipment on the job?

A. Well, all the material that was down there we had to keep guard over them in case of fire, and when they were putting them on them floats there with the derrick—used to be lifting all this material on floats—whenever they took it we had to watch because once in a while there was a little fire there and if there was any little fire around there we had to watch them. Now, like one of the boats used to transport them back and forth from St. George to St. David's Island that went on fire one morning coming across we had to put it out. We had to watch all materials there and guard it against fire.

Q. Did you observe whether or not this material was being loaded for shipment outside of the base or was it solely for use at the base?

A. Oh, some of it was because where a convoy was on the outside there any ships that had cargo on it shifted, it came into Bermuda, into St. David's Island there to have it fixed up. Now, they would have to take off maybe all the material that was on—trucks and everything else and re-load it again.

Now, sometimes they couldn't put back them trucks there again and they had to leave them there until they returned again. Now, I never knew where they went to, nobody else did down there. When the cargo shifted at all they brought the men there, they brought them in there to have it straightened out and the Bermuda men that did straighten it out took the material off and re-loaded it again.

[fol. 63] Q. Did you observe whether or not any equipment or materials that had been used at Bermuda base was ever shipped away from Bermuda base?

A. Oh, yes. There was; all that stuff was dismantled there, crated and put in to floats and taken away.

Q. It was part of your duties and the duties of the other firemen to guard these materials and this equipment?

A. We had to inspect it every so often at night and day. We had to inspect all them places where they were crated up on the Industrial Area.

Redirect examination.

By Mr. Creel:

Q. Mr. Connell, neither you nor any of the other firemen ever assisted in the loading or unloading of a ship?

A. No, no. We only just watched it.

Q. Did you perform any duties aboard ships?

A. No.

Q. Other than the "Berkshire", the barracks ship?

A. No. We were called over to one ship—I forget the name of it—it was in the St. George—in the pier there—we were called over there one night and I don't know whether I didn't do any work there—whether some of the other men did or not. By the time we got over there there was a fire burning in one of them ships for three or four hours—only just smoke was all I saw. When I got over there we were only a short time there, we came home. I did not do any work there. I won't say whether any of the other fellows did any work there or not.

Q. And you never performed any duties aboard any of these ships where cargo was being shifted?

A. No, I just watched them. We had line stretched to pump her out there, a line stretched in case anything did happen.

Q. Where were your lines, ashore?

A. Well, we used to take those pumpers right to the shore and draft water and stretch the line. Now, in case anything started all we had to do was start the motor.

[fol. 64] Q. Where was the ship?

A. Right there in St. David's Island where they used to be bringing that stuff into floats—the derricks would be loading that stuff into floats.

Q. The ships couldn't approach St. David's Island within any range where your equipment could reach it, could they?

A. No, not there, but over on the pier it could, over on St. George.

Q. Did you ever go over with your equipment to a ship in St. George and fight a fire?

A. I didn't do any duty there. I went over there—there was a fire on one of them ships—it was in there but I didn't do any duty. The only time we did any duty was at St. George's Hotel. We were called over there one night and St. George's Fire Department was there.

Q. Well, so far as you know, did any other of the firemen ever perform any duties in extinguishing a fire on a ship, so far as you know? Do you know of any such?

A. No, no.

Q. Isn't it probable that you had heard of a fire aboard of a ship in which you men took part in?

A. The only fire duties we did aboardship was in connection with the ferryboat that was used to transport materials, equipment and men from St. George to St. David's Island.

(Whereupon, at 12:10 P. M., this Deposition closed.)

John Joseph Connell.

(Subscribed and sworn to before me this 10th day of August, 1946.) Jacob Bromberg, Attorney & Counselor-at-Law, Office and Post Office Address: 225 Broadway, New York City. Residing in Kings Co. Clk: 8810, Reg. No. A282-B-8, N. Y. Co. Clk's No. 40, Reg. No. A-336-B-8, Queens Co. Clk's No. 54, Reg. No. A-468-B-8. Notary Term expires March 30, 1948.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DAVID JOSEPH TOWNSEND, READ IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

David Joseph Townsend being duly sworn, deposes and says:

I am one of the plaintiffs above-named and am fully familiar with all the facts and circumstances surrounding our cause of action herein. I am fully acquainted with all the work done by all the plaintiffs in this action and make this affidavit in opposition to the defendant's motion for summary judgment on behalf of all of us. Mr. Robert Glenn, the supervisor in charge of the project, on behalf of the defendants in his affidavit in support of this motion did not fully state or describe the full extent of the work performed by the plaintiffs.

[fol. 66] The plaintiffs were not engaged in merely "Local" policemen and firemen activities as contended by the defendants. A substantial part of the activities of the plaintiffs was directly concerned and connected with the movement of goods moving and produced in commerce, which "goods" came from the States and part of which went from Bermuda to other places unknown to the plaintiffs.

The plaintiffs were all hired under similar contracts and worked for the defendants during the years 1941, 1942 and 1943. That at the time the plaintiffs were hired they received a contract from the defendants stating that they would be paid a certain sum per week. After the execution of the contract, each of us received a mimeographed sheet of paper explaining what we had to do and which also stated that our work week would be 48 hours per week. When we got down to Bermuda, we were told that we would be required to work 8 hours per day, 56 hours per week and would be paid time and a half for each hour over 8 hours of any one day.

We were not hired to guard and protect pieces of construction work or merely the materials which went into such

construction. There was little danger of construction work being stolen or vandalized.

A substantial part of our duties as firemen and patrolmen was to protect the enormous quantities of merchandise, goods, vehicles, materials, tools and equipment being loaded and unloaded from ships docked at St. George and Hamilton, Bermuda, being transported to and from said dock to the bases being constructed by the defendants; guard and protect at the bases, some for use in the construction work, others to be reshipped or reassembled for reshipment elsewhere and some to be delivered to the commissary conducted by the defendants, where goods of every conceivable description were sold to the population, which included employees of the defendants and natives of Bermuda. Included in this vast amount of materials, etc. were thousands [fol. 67] of crates of materials, equipment, etc., which were never opened but were reshipped to other places. These unopened crates were guarded and protected both at the base and at the docks. It was one of our most important duties to watch these original crates and equipment which were awaiting reshipment, sometimes by reshipment upon the same vessel that brought the merchandise or on other ships that came later. Because of wartime conditions, none of us were aware of the places the said merchandise, equipment, etc. was shipped.

The defendants, in addition to the construction of the bases, operated commissaries, where enormous quantities of merchandise were sold. It was part of our duty to patrol and protect merchandise being delivered to the commissaries and while in the commissaries.

Those of us who were patrolmen guarded these materials and equipment against theft and vandalism and those of us who were firemen guarded these materials and equipment against danger from fire.

Our posts of duty changed constantly. When a ship came in some of us were directed to the docks and remained until the ship was unloaded, similarly when a ship was loaded. Some of us when we came to Bermuda and when we left Bermuda, were directed to patrol and guard merchandise and equipment belonging to the defendants located on the ships. This work on board ship was not done under the direction of any ship officers to the knowledge of any of us, but were directed by orders from our own immediate supervisors in

the employment of the defendants. We guarded their merchandise which was being sent to Bermuda, or as the case may have been, returned to the States. We understood this to be a part of our employment with the defendants.

None of the plaintiffs could under any stretch of the imagination be classified as executives. We had no power of management. We all took orders whether we were ordinary patrolmen, sergeants, or lieutenants. We could not [fol. 68] hire or fire. We had the responsibility to carry into effect directives and orders given to us by the captain who in turn took orders from his superior. Our work was always checked and supervised by others. Even those of us who had the title of sergeant or lieutenant were required to do similar work as ordinary patrolmen and a substantial part of our time was spent in such work.

David Joseph Townsend.

(Sworn to the 20th day of September, 1946.)

In United States District Court

[Title omitted]

Affidavit of John Joseph Connell, Read in Opposition to Motion for Summary Judgment

[fol. 69] State of New York,
County of New York, ss:

John Joseph Connell being duly sworn says:

I am one of the above named plaintiffs. I have read the foregoing affidavit of David Joseph Townsend, I aver that the statements therein stated are correct and desire to add the following additional facts.

A great deal of supplies and equipment was crated at the bases, transferred to floats which were towed from the barges to St. George for shipment to the United States and possibly elsewhere. As part of our duties we guarded and watched these supplies being shipped, which also included motor trucks, bull-dozers and other types of vehicles.

John Joseph Connell.

(Sworn to the 20th day of September, 1946.)

[fol. 70] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JACOB BROMBERG, READ IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Jacob Bromberg being duly sworn says:

I am the attorney for the plaintiffs in this action.

Due to the fact that the plaintiffs reside out of the City of New York or are temporarily away from the City I have been unable to obtain affidavits from each one of them in opposition to the defendants motion for Summary Judgment.

I have however, on numerous occasions interviewed each plaintiff and am fully acquainted with all the facts of their respective claims. By reason of these personal interviews the data in my files and my own independent investigation I am able to state that the causes of action of all the plaintiffs are substantially alike and that if they were available [fol. 71] they would make similar affidavits in opposition to this motion as have been made by David J. Townsend and John J. Connell, with little if any variance.

Defendant's attorneys in the affidavit of J. Randall Creel submitted in support of their motion refer to correspondence had with the Departments of State and Interior of the United States Government which is obviously intended to convey the impression to this court that the areas leased by our government in Bermuda are United States possessions. In this connection it is important to bring to the attention of this court another inquiry seemingly made by the attorneys for the defendants herein directed to the Wage and Hour and Public Contracts Divisions of the United States Government. I say seemingly, because the answer given to this inquiry which is dated May 21, 1946 involves a specific reference to the Bermuda bases which are involved in the case at bar and is directed to a firm of attorneys. Regardless whether the attorneys for these defendants made the inquiry or not it is important to bring this inquiry to this court's attention to be considered with the letters from the

State Department. This inquiry and answer appears in 1946 Wage and Hour Cases at page 1276:

"Question: Does the Fair Labor Standard Act apply to employment on construction of Army and Navy bases in territories this government has leased from the British? Our problem specifically pertains to employees working at American installations in Bermuda known as Fort Bell and Kindley Field.

"Answer (Deputy Administrator): As you know, the Act covers employees 'engaged in commerce or in the production of goods for commerce' Section 3(b) defines 'commerce' as 'trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof', [fol. 72] and in Section (3) 'State' is defined as 'any State of the United States in the District of Columbia or any territory or possession of the United States.'

"An examination of the legislative history of the Act relative to the meaning of the phrase 'territory or possession of the United States' does not reveal anything pertinent to the instant problem. Since these bases were secured from the British subsequent to the passage of the Act, the particular problem under consideration did not then exist.

State of the United States in the District of Columbia or any territory or possession of the United States.'

"Apparently, the only two decisions having any bearing on the decisions having any bearing on the question are Felardo v. Foley Bros., 45 N. Y. Supp. (2) 262 (New York Supreme Court, special term) and Eckert v. Elmhurst Construction Company, 56 N. Y. Supp. (2d) 98 (New York City Court trial term), both cited in the latter letter from your firm. The Eckert case, involving an employee working at an American Naval base at British Guiana, appears to be on all fours with your situation. The base where he worked was established under the same general agreement with the British as the bases in Bermuda, giving the United States a 99 year lease. See 55 Statutes at Large, Vol. 2, page 1560 et seq. In the Eckert case the court held that the base where plaintiff worked was a temporary 'possession of the United States' within the meaning of Section 3(c) of the Fair Labor Standards Act and

that he came within its coverage. On the other hand, I do not believe the Felardo case is directly in point; the plaintiff, who was held not to be covered by the Act, worked on buildings, equipment and bases in Iran, with nothing being offered to show that the United States [fol. 73] had any special long-term leases there. It should also be pointed out that the three interpretations of the Wage and Hour and Public Contracts Divisions to which the court referred in support of its decision pertained to the employees who, though working in foreign countries, were not employed at bases leased by this country.

"State Department officials who were consulted regarding the problem you presented, indicated that thus far the United States Government has not made any claim that the base secured from the British are possessions of this country and that the State Department has not made any ruling or issued any interpretations pertaining to the matter.

"I believe that a determination regarding the status of these leased lands lies outside the province of the Wage and Hour and Public Contracts Divisions, and until the question has been settled by court decisions, congressional or executive acts, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees at bases leased from the British.

"I regret that the nature of your problem is such that I cannot give you a more definite answer. * * *"

At the argument of the motion I will present to the Court a printed copy of the Agreement relating to the leased areas entered into between Great Britain and the United States, which it is submitted shows that the bases so acquired by the United States are temporarily possessions of the United States over which our government has full sovereign and possession rights reserving however, the right to British vessels to trade with the areas leased.

[fol. 74] Upon the trial of this action the evidence of each plaintiff will prove that a substantial part of each day's work was to guard and to protect enormous supplies of goods, merchandise, tools, equipment and materials in commerce.

Wherefore, plaintiffs pray that the defendants' motion for summary judgment be denied with costs.

Jacob Bromberg.

(Sworn to the 23rd day of September, 1946.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF JAMES RANDALL CREEL, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[fol. 75] STATE OF NEW YORK,
County of New York, ss:

JAMES RANDALL CREEL, being duly sworn, deposes and says:

Subsequent to the service of the defendants' notice of motion for summary judgment on September 3rd, 1946, the plaintiffs served, by mail, a sworn denial in reply to defendants' requests for admissions heretofore served upon the plaintiffs on July 23rd, 1946.

Although the plaintiffs' service of such sworn denial was not timely, the defendants' attorneys have nonetheless given the plaintiffs a due and timely service of such sworn denial.

The plaintiffs' sworn denial so served does not alter any of the three basic facts upon which this motion for summary judgment is based, i.e., it has not been denied that:

1. The duties performed by the plaintiffs were the furnishing of police and fire protection to the original construction work being performed by the defendants in the Island of Bermuda (Requests for Admissions Nos. 2 and 3).

2. The construction work performed by the defendants in the Island of Bermuda was original construction and no part thereof was reconstruction or repair (Requests for Admissions, No. 4).

3. While it is denied that the plaintiffs performed all of their duties in the leased area of Bermuda, the plaintiffs' sworn denial does admit that all such duties were performed either in (a) "the City of St. George on St. David's Island";

(b) "in the navigable waters around Bermuda and St. [fol. 76] David's Island", as well as (c) in the leased areas of the Island of Bermuda.

Hence, it is admitted that all of the duties of the plaintiffs were performed in the area immediately adjacent to the Island of Bermuda.

Therefore, the sworn denial served by the plaintiffs in no way denies any of the basic facts upon which this motion for summary judgment is based.

Upon these uncontroverted facts, it is contended by the defendants that they are entitled to summary judgment as a matter of law, upon the following grounds:

First: The Fair Labor Standards Act does not apply to employment in the Bermuda area.

Second: The furnishing of police and fire protection to original construction work is "local" and is not covered by the Fair Labor Standards Act.

Third: As appears from the admissions in their depositions on file herein, the plaintiffs John Joseph Connell and David Joseph Townsend are exempt from the provisions of the Fair Labor Standards Act as administrative and executive employees.

Not only does the sworn denial of the plaintiffs not contravert any of the basic facts but indeed suggests another and different ground for granting this motion for summary judgment, for insofar as the plaintiffs state their duties were performed on "ferry boats, tugs and other vessels in the navigable waters around Bermuda and St. David's Island", another exemption clause of the Fair Labor Standards Act is involved, namely, Section 213(a)(3), Title 29, which exempts seamen and those performing duties of seamen. If the plaintiffs were, in fact, performing the duties of their employment aboard ferry boats, tugs and other vessels (a fact which the defendants' proof will contradict), [fol. 77] they were performing duties of seamen and hence are exempt from the provisions of the Fair Labor Standards Act. (Gale v. the Union Bag & Paper Corporation, 30 Fed. Supp. 647, affirmed 116 Fed. (2nd) 27, Certiorari denied 313 U. S. 559, 85 L. Ed. 1519, 61 S. Ct. 837.)

James Randall Creel.

(Sworn to the 3rd day of September, 1946.)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr., and David Joseph Townsend, Plaintiffs,

—against—

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, Defendants

Civil Action 34-733

[fol. 78] Appearances: Jacob Bromberg, Esq., Attorney for Plaintiffs (N. Y. City); Sol L. Firstenberg, Esq., of Counsel.

Messrs. Eidlitz, French, Fink and Markle, Attorneys for Defendants (N. Y. City); James Randall Creel, Esq., of Counsel.

OPINION

COXE, D.J.:

This is a motion by the defendants for summary judgment in their favor.

The action is brought by eleven former employees of the defendants for additional overtime compensation, liquidated damages, and an attorney's fee, under the Fair Labor Standards Act of 1938 (29 U. S. C. A. § 201, et seq.).

The defendants were jointly engaged in the construction of an Outlying Defense Base, known as Fort Bell and Kindley Field, in the Bermuda Islands, under a cost-plus-a-fixed fee contract entered into with the United States (by Lt. Col. J. D. Arthur, Corps of Engineers, United States Army), dated February 4, 1941. This construction work was being performed exclusively in areas leased to the United States for ninety-nine years pursuant to an executive agreement between the United States and British governments, dated March 27, 1941, providing for the leasing to the United States of various areas, including areas in the Bermuda Islands, for the establishment of naval and air bases. (See 55 Stats., Part 2, pp. 1560-1591.)

The plaintiffs were employed by the defendants at different times during the period from September 1941 to the middle of 1943 in connection with the construction of this Defense Base, and all of the work for which the plaintiffs are now asking overtime compensation was performed in Bermuda and directly concerned with such construction. [fol. 79] Seven of the plaintiffs were employed as patrolmen and acted as policemen in the leased areas; the other four plaintiffs were employed as fire patrolmen and acted as firemen in the same areas. During the course of their employment, one of the plaintiffs, who had been employed as a patrolman, was promoted to be a "sergeant of police", and another of the plaintiffs, who had been employed as a fire patrolman, was promoted to be a "lieutenant" of the fire department.

The defendants make three contentions in support of the motion, namely, (1) that the Fair Labor Standards Act has no application to the employment of the plaintiffs in the leased areas of Bermuda, (2) that the plaintiffs were engaged in work of original construction, and were, therefore, not covered by the Act, and (3) that two of the plaintiffs are exempt from the provisions of the Act as executive and administrative employees.

The Fair Labor Standards Act has no application to the employment of the plaintiffs in the leased areas of Bermuda. This Act, in Section 206 and 207, provides for minimum wages and maximum hours for employees "engaged in commerce or in the production of goods for commerce" (29 U. S. C. A. §§ 206(a) and 207(a)). Section 203(b) defines "commerce" as meaning "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof", and Section 203(c) defines State as meaning "any State of the United States or the District of Columbia or any Territory or possession of the United States" (29 U. S. C. A. § 203(b) and (c)).

None of the leased areas of Bermuda in which the construction work of the defendants was being performed was a "Territory or possession of the United States" within the meaning of the language of the Fair Labor Standards Act. The plaintiffs make no contention that any of these leased areas is a "Territory" of the United States, but they insist [fol. 80] that such areas are possessions of the United

States. Whether they are possessions of the United States depends on whether they are within the sovereign jurisdiction of the United States. That is a political question to be determined by the legislative and executive departments of the government, and not by the courts. *Jones* v. *United States*, 137 U. S. 202, 212; *Pearcy* v. *Stranahan*, 205 U. S. 257, 265.

The legislative and executive departments of the government have clearly indicated that these leased areas are not within the sovereign jurisdiction of the United States. In 1940, while the negotiations for the leased areas were in progress, Attorney General Jackson rendered a formal opinion to the President regarding the proposed executive agreement with Great Britain, in which he stated as follows:

> "The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use *with the sovereignty retained by Great Britain.* Our Government assumes no responsibility for civil administration of any territory * * *". (39. Op. A. G., 484,485).

Moreover, the State Department, in a letter to the attorneys for the defendants, dated June 20, 1946, has advised that "this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States". And in a recent Statute (Act of March 22, 1943, 57 Stat. 41, 34 U. S. C. A. Sec. 1201), the Congress has indicated that it regarded leased areas as without the territorial jurisdiction of the United States. This statute extended the jurisdiction of naval courts martial to civilian employees and others at naval bases and air stations "within an area leased by the United States *which is without the territorial jurisdiction thereof.*"

[fol. 81] The only case cited by counsel in which the precise question now raised was adjudicated is *Eckert* v. *Elmhurst Contr. Co.*, decided by the New York City Court, July 10, 1945, (185 Misc. 108) and affirmed without opinion by the Supreme Court Appellate Term (186 Misc. 100). This was a suit brought under the Fair Labor Standards Act by an employee at a naval and air base in British Guiana in one of the areas leased to the United States under the same ex-

ecutive agreement involved in the present case. The court held on an analysis of the executive agreement that the leased area was a temporary possession of the United States, and that therefore the plaintiff was within the coverage of the Fair Labor Standards Act. I think that this ruling is contrary to well-established law because it assumes to decide the political question of sovereignty, which is not for the courts to determine.

With this determination it is unnecessary to pass on the other contentions of the defendant.

The motion of the defendants for summary judgment dismissing the complaint is granted.

October 19, 1946.

Alfred C. Coxe; U. S. D. J.

[fol. 82] In United States District Court for the Southern District of New York

(Civil Action 34-733)

John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, Plaintiffs,

against

Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson, Corp., Doing Business as Bermuda Base Contractors, Defendants

Judgment on Order

A motion having been made by the defendants herein for summary judgment in their favor pursuant to the provisions of Rule 56 of the Rules of Civil Procedure for the District Courts of the United States and the said motion having been regularly brought on for argument before the Honorable Alfred C. Coxe, U. S. D. J. at the Motion Term of this Court on the 25th day of September, 1946 and the parties having duly appeared by their attorneys; after hearing Eidlitz, French, Fink and Markle, attorneys for all defendants, James Randall Creel, of counsel, on behalf of said motion, and Jacob Bromberg, attorney for all plaintiffs,

Solomon L. Firstenberg of counsel, in opposition thereto, and due deliberation having been had, and the Court having [fol. 83] duly made and filed its written opinion on the 21st day of October, 1946, directing judgment dismissing the complaint,

Now, on motion of Eidlitz, French, Fink and Markle, attorneys for the defendants, it is

Ordered, Adjudged and Decreed that the plaintiffs' complaint in the above entitled action be, and the same hereby is, dismissed upon the merits.

Dated: New York, November 1st, 1946.

Approved:

Alfred C. Coxe, U. S. D. J.

Judgment Rendered. William V. Connell, Clerk. Nov. 1, 1946.

[fol. 84] In United States District Court

[Title omitted]

Notice of Appeal

Sirs:

Please take notice that the Plaintiffs, John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, Joseph John Gilroy, John Joseph Mortimer, James F. McDonald, Paul F. Nieter, William H. Parker, Jr., Louis August Rehberg, Howard L. Shock, Jr. and David Joseph Townsend, above named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of the United States District Court, Southern District of New York, rendered and filed in the Office of the Clerk of said Court, on November 1st, 1946, dismissing the Plaintiff's complaint on the merits and the said Plaintiffs' appeal from each and every part of said judgment as well as from the whole thereof.

[fol. 85] Please take further notice that Appellants intend to bring up for review on such appeal, the decision of the Court dated October 19, 1946, granting said judgment.

Dated, New York, N. Y., December 17, 1946.

Yours, etc., Jacob Bromberg, Attorney for Plaintiffs, Office and P. O. Address, 225 Broadway, New York 7, N. W.

To: Eidlitz, French, Fink & Markle, Esqs., Attorneys for Defendants, 110 East 42nd Street, New York 17, N. Y.

——, Clerk, United States District Court, Southern District of New York,

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[fol. 86] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the said District Court in the above entitled action, as agreed on by the parties.

Dated, New York, April 25, 1947.

Jacob Bromberg, Attorney for Plaintiffs-Appellants.
Eidlitz, French, Fink and Markle, Attorneys for Defendants-Appellees.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 51

(Argued October 17, 1947. Decided November 28, 1947)

Docket No. 20717

JOHN JOSEPH CONNELL et al., Plaintiffs-Appellants,

v.

VERMILYA-BROWN COMPANY, INC., et al., Defendants-Appellees

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York.

Action by John Joseph Connell and ten others against Vermilya-Brown Company, Inc., Necaro Company, Inc., and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, for additional overtime compensation, liquidated damages, and an attorney's fee under the Fair Labor Standards Act, 29 U. S. C. A. §201 *et seq.*, brought to the Supreme Court of New York and removed by the defendants to the court below. From a summary [fol. 89] judgment for defendants, the plaintiffs appeal. Reversed and remanded.

Sol L. Firstenberg, of New York City (Jacob Bromberg, of New York City, on the brief), for plaintiffs-appellants.

James Randall Creel, of New York City (Eidlitz, French, Fink & Markle, of New York City, on the brief), for defendants-appellees.

CLARK, Circuit Judge:

This appeal presents the interesting question whether or not the Fair Labor Standards Act, 29 U. S. C. A. §201 *et seq.*, applies to work done on an Outlying Defense Base in Bermuda obtained by the United States under a 99-year lease and executive agreement with the British Government on March 27, 1941. Defendants were engaged in a joint venture for the construction of such a base, now

known as Fort Bell and Kindley Field, under a contract with the United States made February 4, 1941. Plaintiffs are eleven former employees of defendants seeking the benefits of the Act. Decision has gone against them below on summary judgment, and they now appeal.

Plaintiffs were hired in New York and were employed by defendants at different times during the period from September, 1941, to the middle of 1943 in connection with the construction of this Defense Base. All of the work for which they seek overtime compensation was performed in Bermuda. Seven of them were employed as patrolmen and acted as policemen in the leased areas; the other four were employed as fire patrolmen and acted as firemen in [fol. 90] the same areas. The affidavit of plaintiff David Joseph Townsend, supported by the affidavit of plaintiff John Joseph Connell, describes the character of the work in which all the plaintiffs were engaged. Townsend avers that a substantial part of their duties was to protect materials unloaded from ships docked in St. George and Hamilton, Bermuda. Included in such materials were crates that were never opened, but were reshipped to other places. He did not know their ultimate destination. Because of wartime conditions he was unaware of the places to which the materials were shipped.

The obligations defined by the Act are required of every employer for the benefit of each of his employees "who is engaged in commerce or in the production of goods for commerce," 29 U. S. C. A. §§206, 207, with certain exemptions not here pertinent stated in §213. "Commerce" is defined to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof"; while "'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States." §203(b) and (c). The district court ruled that none of the leased areas of Bermuda where the construction work of the defendants was being performed was a "Territory or possession of the United States" within the meaning of the Act. Our question is therefore as to the correctness of this ruling and specifically whether or not the leased area is a "possession" within the statutory meaning.

Initially we must ascertain the nature and extent of the transfer of interest made by the Government of the United

Kingdom of Great Britain and Northern Ireland to this country in the Agreement and Lease, as set forth in 55 Stat. Pt. 2, 1560-1594. The Lease itself refers to notes [fol. 91] previously exchanged for the grant "of the lease of naval and air bases and facilities connected therewith, in certain localities," and then provides for the demise to the United States of America of "all that property described in the Schedule hereto and delineated on the plan annexed hereto" for a term of 99 years, with the "rights, powers and authority and on the terms and conditions" stated in the contemporaneous Agreement, which "shall be regarded as incorporated in and made part of this lease." 55 Stat. Pt. 2, 1577.

The Agreement is therefore the important document for our purposes. This provides initially as a "General Description of Rights": "The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the Leased Areas, which are necessary to provide access to and defence of the Leased Areas, or appropriate for control thereof." Art I(1), 55 Stat. Pt. 2, 1560. It then continues with the enumeration of certain specific "rights, power and authority" included "inter alia," such as "(a) to construct (including dredging and filling), maintain, operate, use, occupy and control the said Bases," and "(d) to regulate and control within the Leased Areas all communications within, to and from the areas leased." 55 Stat. Pt. 2, 1561.

Other provisions also serve to show the nature of the grant. Thus the United States is given the "absolute right" to assume and exercise jurisdiction of all offenses within a leased area, by a British subject "apprehended therein," and by any other person, without restriction, with provision for surrender of offenders to the appro- [fol. 92] priate authority of the Territory if the United States so elects, Art. IV(1, 2), and for surrender of offenders to the United States authorities where they are within the Territory, but outside the leased areas, Art. VIII. The immigration laws of the territory adjacent to the bases do not apply to the leased areas, Art. XIII. United States postal facilities are to be established in the leased areas,

Art. XVI. No person in the leased areas serving or employed there can be subject to income tax or poll tax of the territory adjacent to the bases, Art. XVII. The leased areas are to revert to the "Lessor" only when abandoned by the United States with "notice" of such abandonment, Art. XXI. And Art. XXIV, significantly entitled "Possession," provides: "On the signing of this Agreement, leases of the Leased Areas, substantially in the forms respectively set out in Annex II hereto, shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (including transfer of possession where it shall not previously have been transferred) shall thereupon become effective immediately, and pending execution of such Leases they may be exercised *ad interim* and possession of the Leased Areas shall be immediately given so far as the location thereof is then ascertained. Where the precise location of a portion of any Leased Area is not ascertainable until more detailed descriptions are available, possession of such portion shall be given as rapidly as possible." 55 Stat. Pt. 2, 1569.

The Agreement does not specifically declare the leased areas to be part of the territory of the United States. It does contain, however, the following interesting negative provision: "It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." Art. XI(4), 55 Stat. Pt. 2, 1565.

[fol. 93] The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as "possessions" of the United States. Thus, Title 48 of the United States Code entitled, "Territories and Insular Possessions," includes laws relating to such diverse areas as the Philippine Islands, §1001 *et seq.* (compare usage in the Supreme Court, *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 672-674, 678, 680); the islands upon which guano is discovered, §§1411-1419; and Swains Island, Tutuila, Manua, and other Samoan islands, and Guam, §§1431, 1431a, 1432, 1433, with all the diverse governments and degrees of sovereignty involved in these instances. Except for the Philippines, now made independent, 48 U. S. C. A. §1231 *et seq.*, those possessions seem rather clearly included within the coverage of the

Act; indeed, the General Counsel of the Division specifically includes Guam, Guano Islands, and Samoa along with Alaska, Hawaii, Puerto Rico, the Canal Zone, and the Virgin Islands as "territories and possessions" subject to the Act. Release No. 73, Office of the General Counsel Wages and Hours Division.[1] The Act would seem broadly enough phrased, in its purpose "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567, to cover American workmen at Bermuda bases as fully as natives working in Samoa or Guam.[2] [fol. 94] Indeed, the coverage is, if anything, still broader; the statutory reference is to "possession" uncapitalized (unlike the reference to "Territory"), not even to "Insular Possessions," and may indeed be intended to be as broadly inclusive as the simple definition of Webster's Dictionary: "The thing possessed; that which anyone occupies, owns, or controls; in *pl.*, property in the aggregate; wealth; dominion; as, foreign *possessions*." We need not so decide at this time; but we feel compelled to conclude that the intended coverage of the Act is sufficiently broad to include areas such as those here in question.

Defendants urge, and the district court agreed, that the question whether the areas are possessions is a political one, either already settled or to be settled only by executive or legislative determination. Undoubtedly courts should avoid the determination of political issues, but it is difficult to see how this is such an issue. Before us is a matter of interpretation of an Act in issue between two groups of

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[1] Defendants stress the omission of these leased areas from the General Counsel's enumeration. But there is no indication of an intent to exclude all else. An answer to an inquiry, made by the Deputy Administrator, properly stresses the conflicting legal decisions and expresses regret that he cannot give a more definite answer as to those areas. Prentice-Hall Wage and Hour Serv. par. 11,809, 1946.

[2] Thus it was found necessary to extend the more limited coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§902(8, 9), 903, as provided in Defense Base Compensation Act of Aug. 16, 1941, as amended Dec. 2, 1942, 42 U. S. C. A. §§1651-1654; *Republic Aviation Corp.* v. *Lowe*, 2 Cir., Nov. 6, 1947.

private parties. Obviously this arises in consequence of political acts, and those conceivably might have been of such precise form or exact agreement with a foreign state as to settle the question. But here they were not, and we must determine this private controversy, even if it arises as to areas affected by an agreement between nations. *Ex parte Cooper*, 143 U. S. 472, with full discussion at 499-503. As a matter of fact the courts have not hesitated to determine the status of acquired territory for the purposes of a particular case and with reference to particular acts of Congress, including those passed prior to such acquisition. [fol. 95] *De Lima* v. *Bidwell*, 182 U. S. 1; *Huus* v. *New York & Porto Rico S. S. Co.*, 182 U. S. 392; *Fourteen Diamond Rings* v. *U. S.*, 183 U. S. 176; *Gonzales* v. *Williams*, 192 U. S. 1; *Faber* v. *U. S.*, 221 U. S. 649; *Hooven & Allison Co.* v. *Evatt*, *supra*; *La Ninfa*, 9 Cir., 75 F. 513.[3]

If, however, the other departments of government have shown a clear view as to the proper answer to this problem, we should certainly take at least careful note of that fact. But, notwithstanding defendants' contentions, it seems clear that they have not. Thus defendants quote from the opinion of the Attorney General upholding the validity of the Executive Agreement here, wherein he states, "The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States' use with the sovereignty retained by Great Britain."[4] But this is aimed at a different problem; it can be easily claimed as authority *favoring* the plaintiffs' position, rather than the reverse. They also cite a letter from the State Department, by its Acting Legal Adviser, to the effect that "this Gov-

[3] Thus, these cases also demonstrate the unsoundness of defendants' further contention that this Act may not apply to a newly acquired possession until Congress has specifically made it applicable. Cases cited by them concern only the guaranties of the Constitution, such as trial by jury, which have been held not to extend to the insular possessions except as Congress has made them applicable. *Balzac* v. *People of Porto Rico*, 258 U. S. 298; *Dorr* v. *U. S.*, 195 U. S. 138, 1 Ann. Cas. 697; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674.

[4] 39 Ops. Att'y Gen. 484, 485, re "Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers."

ernment has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling [fol. 96] or opinion on the matter."[5] Both the facts that this statement was made in quite a different setting and that there was "no reason for any ruling or opinion on the matter" clearly negate any suggestion that the Executive Departments have determined the issue.[6]

We have discovered only two cases squarely dealing with this problem, and each has held the Act applicable. *Eckert v. Elmhurst Contracting Co.*, 185 Misc. 108, 56 N. Y. S. 2d [fol. 97] 98, affirmed 186 Misc. 100, 61 N. Y. S. 2d 730;

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[5] The letter addressed to defendants' attorneys is as follows:

"SIRS:

"The department has received your letter of May 1, 1946 with further reference to the status of bases leased from Great Britain.

"The bases in Bermuda were obtained under the same circumstances as the other bases obtained from Great Britain as will be apparent from the documents contained in Executive Agreement Series 235 to which you were referred in a previous communication. As you were advised by the Department's letter of April 30, 1946 this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States and there would therefore appear to be no reason for any ruling or opinion on the matter.

"Very truly yours, For the Acting Secretary of State: R. W. Flournoy, Acting Legal Adviser."

The earlier letter of April 30, 1946, merely answered the specific question whether or not civil courts of the United States had been established in the area. Thus the letter in context shows that the problem considered by the State Department concerned not the present issue, but rather the general status of the leased areas with particular respect to the establishment of civil courts.

[6] Other references seem even less pointed. They include a reply to counsel from the Acting Director, Division of Territories and Island Possessions, of the Department of

Crowe v. *Elmhurst Contracting Co.*, Sup. Ct., N. Y. County, N. Y. L. J. Apr. 17, 1947, p. 1496. *Watt* v. *McWilliam Dredging Co.*, City Ct., N. Y., N. Y. L. J. Nov. 1, 1944, p. 1130, considered the applicability of the Act to a storekeeper on construction work in Greenland in an area leased to this government by Denmark. The court there held for the defendant on the separate ground that plaintiff storekeeper was not engaged in commerce or in the production of goods for commerce under the Act. This case did not decide whether or not the area was a "possession" within the meaning of the Act. In *Filardo* v. *Foley Bros.*, 181 Misc. 136, 45 N. Y. S. 2d 262, the Act was held not to apply to a defense base in Iran; in *Campbell* v. *White Const. Co.*, Civ. No. 28-230, D. C. S. D. N. Y. 1944, unreported, a similar ruling was made as to a base in Brazil. So, too, in *Bernhard* v. *Metcalfe Const. Co.*, D. C. Neb., 64 F. Supp. 953, and *Burns* v. *Metcalfe Const. Co.*, D. C. W. D. Mo., 69 F. Supp. 381, the Act was held not to apply to construction jobs in Canada. The facts in these cases indicate distinctions from those present here. There the problem was whether or not the Act would apply to persons working in foreign countries. Here there is a long-term lease entered into with our government which gives it sweeping powers in the area. Without such arrangements for control these other plaintiffs were shown only to be working in foreign countries to which the coverage of the Act has not been extended.

The affidavit of plaintiff Townsend, cited above, avers that a substantial part of the plaintiffs' duties was to protect goods and materials loaded and unloaded from ships docked at St. George and Hamilton, Bermuda; and included in such materials were thousands of crates that were never opened, but were reshipped to other places. In the light

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the Interior, that no executive order or other directive had given his division jurisdiction over these *military* and *naval* bases; also citation of an Act of March 22, 1943, 34 U. S. C. A. 1201, extending the jurisdiction of naval courts martial to civilian employees and others at naval bases and air bases within areas leased by the United States "without the territorial jurisdiction thereof." *Cf.* Art. IV, of the Executive Agreement, discussed above; also notes 1 and 2, *supra*.

[fol. 98] of this assertion we cannot say they were not engaged in commerce. See *Engebretsen* v. *E. J. Albrecht Co.*, 7 Cir., 150 F. 2d 602; and cases therein cited. Another contention by defendants, that two of the plaintiffs were exempt as executives, was not pressed on this appeal.

Reversed and remanded for further proceedings consistent with this opinion.

[fol. 99] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of November one thousand nine hundred and forty-seven.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

JOHN JOSEPH CONNELL, et al., Plaintiffs-Appellants,

v.

VERMILYA-BROWN CO., INC., et al., Doing Business as Bermuda Base Contractors, Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs, and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 100] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. John Joseph Connell, et al., v.

Vernilya-Brown Co., Inc., d.b.a. Bermuda Base Contractors.
51. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 28, 1947. Alexander M. Bell, Clerk.

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 102] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 52,838. U. S. Circuit Court of Appeals, Second Circuit. Term No. 608. Vermilya-Brown Company, Inc., Necaro Company, Inc., et al., Petitioners, vs. John Joseph Connell, Eugene T. Fitzpatrick, William L. Flanagan, et al. Petition for writ of certiorari and exhibit thereto. Filed February 19, 1948. Term No. 608 O. T. 1947.

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1947.~~ 1948.

No. ~~.....~~ 22

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC. and THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS, *Petitioners.*

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR. and DAVID JOSEPH TOWNSEND.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

EIDLITZ, FRENCH, FINK & MARKLE,
J. RANDALL CREEL,
CHARLES FAHY,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute and Documents Involved	2
Statement	3
Specification of Error to be Urged	4
Reasons for Granting the Writ	5
Conclusion	18

CITATIONS.

Cases:

Luckenbach Steamship Co. v. *United States*, 280 U. S. 173	6
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652	8, 9
Fourteen Diamond Rings v. *United States*, 183 U. S. 176	8
Jones v. *United States*, 137 U. S. 202	9
Downes v. *Bidwell*, 182 U. S. 244	9
Balzac v. *Porto Rico*, 258 U. S. 298	9
Hawaii v. *Mankichi*, 190 U. S. 197	9
United States v. *American Trucking Association*, 310 U. S. 534	15
Skidmore v. *Swift & Co.*, 323 U. S. 134	16
Kirschbaum Co. v. *Walling*, 316 U. S. 517	16
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	16

Statutes and Joint Resolutions:

Act of August 18, 1856, 11 Stat. 119, 48 U. S. C. Sec. 1411-1412	9
Act of August 29, 1916, 39 Stat. 547, 48 U. S. C. Sec. 1003	17
Act of March 22, 1943, 57 Stat. 41	12, 16
Defense Base Act, 55 Stat. 622	7, 14
Amended by Act of December 2, 1942, 56 Stat. 1035	7
Fair Labor Standards Act, approved June 25, 1938, 52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*	2, 4, 5, 6, 7, 8, 12, 15
Sec. 3(b)	3
Sec. 3(c)	3, 15
Sec. 5(e), 6, as amended by Act of June 26, 1940, 54 Stat. 615-616	17
Sec. 6	2

Page

Sec. 7 2
Sec. 17 16
Joint Resolution of July 7, 1898, 30 Stat. 750 9
Joint Resolution of March 4, 1925, 43 Stat. 1357, 48 U. S. C. Sec. 1431 9
Joint Resolution of February 20, 1929, 45 Stat. 1253 9
Amended by Act of May 22, 1929, 46 Stat. 3, 48 U. S. C. Sec. 1431a 9
Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424, 33 U. S. C. Sec. 901 *et seq.* 7, 17

MISCELLANEOUS:

CCH Labor Service
Par. 31,852.01(c), General Statement on Coverage (July 11, 1947) 15
Par. 32,102, Interpretative Bulletin No. 2, October 17, 1938 . . . . . 15, 17
Cong. Rec. Vol. 88, p. 9481 16
Convention signed November 7, 1899, by United States, Great Britain and Germany, 31 Stat. 1878 9
Executive Agreement Series 235, "Leased Naval and Air Bases" 3, 10
Agreement, dated March 27, 1941 . . . . . 3, 5, 10
Ambassador Winant, Letter dated March 27, 1941 11
Exchange of Notes, dated September 2, 1940 . . . . 3, 5, 10, 13
Executive Order 8623 (December 31, 1940), 6 F. R. 13 13
Federal Register, Vol. 12, p. 4583, 4584, Sec. 776.1(c) 15
Hearings, H. R. 5096, Committee on Judiciary, House of Representatives (1941) 14
Opinions of Attorney General, Vol. 39, 484, 485 13
Parliamentary Debates, House of Commons, Vol. 364 (August 20, 1940) 13
Parliamentary Debates, House of Lords, Vol. 117 (September 5, 1940) 14
S. Rpt. 26, 78th Cong. 1st Sess. 16
Treaty of Paris, signed December 10, 1898, by United States and Spain, 30 Stat. 1754 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC. and THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS, *Petitioners.*

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR. and DAVID JOSEPH TOWNSEND.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, Vermilya-Brown Company, Inc., Necaro Company, Inc. and The Arthur A. Johnson Corp., doing business as Bermuda Base Contractors, respectfully pray that a writ of certiorari issue to review the judgment entered in the above entitled cause by the United States Circuit Court of Appeals for the Second Circuit, reversing the judgment entered by the United

States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 78-81) is reported at 73 F. Supp. 860. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 88-96) is unreported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on November 28, 1947 (R. 96). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the naval and air base located in the Crown Colony of Bermuda and held by the United States under lease from the British Government for the purposes specified therein and in the Notes exchanged between the two governments on September 2, 1940, with the rights, powers and authority and on the terms and conditions contained in the Agreement between the two governments signed March 27, 1941, is a "Territory or possession of the United States", with the consequence that the Fair Labor Standards Act of 1938 applies thereto.

STATUTE AND DOCUMENTS INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. Sec. 201 *et. seq.*) applies, with certain exceptions, to any employee who is "engaged in commerce or in the production of goods for commerce". Sec. 6, 7.

Section 3(b) defines "commerce" to mean—

> ". . . trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof".

Section 3(c) defines "State" to mean—

> "any State of the United States or the District of Columbia or any Territory or possession of the United States".

The Exchange of Notes, Lease and Agreement between the United States and His Majesty's Government in the United Kingdom are set forth in the printed document separately filed with this petition for the convenience of the Court, entitled "Executive Agreement Series 235, *Leased Naval and Air Bases*" (G.P.O. 1942).

STATEMENT

Petitioners were jointly engaged in the construction of an Outlying Defense Base known as Fort Bell and Kindley Field in Bermuda, a British Crown Colony. Petitioners were so engaged under a cost-plus-a-fixed-fee contract with the Corps of Engineers, United States Army (R. 14-18). The construction work and the services of the employees here involved were performed exclusively in the area, called the Leased Area, held by the United States under ninety-nine year lease from the British Government, pursuant to the Exchange of Notes between the two governments dated September 2, 1940, and an Agreement between the two governments signed at London March 27, 1941, hereinafter more fully discussed. Suit was initiated in the District Court of the United States for the Southern District of New York by eleven employees engaged by petition-

ers to perform the duties of policemen and fire-patrolmen protecting original construction work (R. 5-7). They sued under the provisions of the Fair Labor Standards Act of 1938 for overtime compensation, liquidated damages and attorneys' fees (R. 9-11). Petitioners denied the pertinent allegations of the complaint (R. 12), pleaded as a separate defense that the plaintiffs were not covered by the Act (R. 12-13), and moved for summary judgment (R. 19). Various affidavits and depositions were filed by the parties on this motion (R. 20-77). The District Court granted summary judgment for the petitioners, holding that the Act "had no application to the employment of the plaintiffs in the Leased Areas of Bermuda", because none of those areas was a Territory or possession of the United States within the meaning of the Fair Labor Standards Act. The District Court noted that it was not contended that the area is a "Territory" of the United States, and rejected the contention that it is a "possession" (R. 78 *et seq.*). On appeal the Circuit Court of Appeals for the Second Circuit reversed. It stated the question as follows: "The District Court ruled that none of the leased areas of Bermuda where the construction work of the defendants was being performed was a 'Territory or possession of the United States' within the meaning of the Act. Our question is therefore as to the correctness of this ruling and specifically whether or not the leased area is a 'possession' within the statutory meaning" (R. 89). The Court held that it was, and remanded the case to the District Court.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the naval and air base in Bermuda leased to the United

States by the British Government under and in accordance with the terms of the Lease, the Exchange of Notes dated September 2, 1940, and the Agreement dated March 27, 1941, between the two governments, is a "possession of the United States" and, therefore, within the coverage of the Fair Labor Standards Act.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Circuit Court of Appeals presents an aggregate of important questions which have not been but should be decided by this Court.

(a) The decision rests upon the interpretation of important international arrangements between the United States and the British Government for naval and air bases in Bermuda, arrangements which are indistinguishable for present purposes from those made simultaneously for like bases in Newfoundland, St. Lucia, Antigua, Jamaica, Trinidad and British Guiana. Three basic international papers are involved in each instance,—the Exchange of Notes, the Agreement, and the Lease. These must be interpreted in terms of the national and international meaning, in both a legal and political sense, of a "possession of the United States". The same question has already arisen regarding the status of military outposts in Greenland, Iran, Brazil and Canada (R. 95), which are among other areas leased for defense purposes, under varying terms and conditions, in at least 25 foreign countries.

(b) The decision below raises an independently important question in that it gives novel scope to and scope beyond the fair intendment of the Fair Labor Standards Act. Notwithstanding the great amount of

construction work already performed by the government at these naval and air bases, the Act has not been administratively applied to them; and the work done has been carried forward on an assumption that the Act did not apply. The decision affects not merely the respondents but, as we are well advised, many other employees—native and American—, numerous contractors, and a large sum of public funds, due to the cost-plus-a-fixed-fee method of contracting which has prevailed.

(c) Not only is there involved the scope of the Fair Labor Standards Act, an important matter standing alone, but the basis of the decision brings into operation in the areas affected other statutes and powers of and imposes responsibilities upon the United States which Congress has not expressly extended to nor intended to assume in those areas. In using the term "possession of the United States", Congress did not give it by definition or enumeration a meaning restricted to the purposes of this particular Act.[1] The implications of the ruling below therefore may not be limited to the confines of the particular statute, but bring to the bases all that the concept of a "possession of the United States" means under our Constitution and statutes and under the law of nations.

II.

It is submitted that the decision of the court below is erroneous. The Fair Labor Standards Act became law in 1938. The naval and air bases were not leased from

[1] Compare certain statutes affecting the Panama Canal Zone, set forth in *Luckenbach Steamship Co.* v. *United States*, 280 U. S. 173, 180-181.

the British Government until 1940-1941. The question for review is not whether Congress has the power to extend the coverage of the Act to these bases for the duration of the leases, but rather whether the Act as it now stands should be construed as applicable to them. The position of petitioners is simply that the Bermuda base is not a "Territory or possession of the United States", and that Congress has not made the Fair Labor Standards Act applicable to it by the use of those terms. Congress by amendatory legislation extended the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424) to employment on any "military, air or naval base acquired after January 1, 1940 from any foreign government", and did so in a context plainly excluding such bases from the concept of a "Territory or possession outside the continental United States".[2] In the seven years which have elapsed since

[2] The Defense Base Act, 55 Stat. 622 (1941) provided as follows: . . . "That except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act', approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs".

This section was amended by 56 Stat. 1028, 1035 (1942), to apply to the injury or death of any employee engaged in any employment—

"(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

"(2) upon any lands occupied or used by the United States for

the leases were signed, however, Congress has not extended the Fair Labor Standards Act to such base areas, after ample opportunity to consider the circumstances incident to the bases.

(a) The opinion below rests in substantial part upon the erroneous belief expressed by the court that the Leased Areas are subject to "fully as complete control by the United States" as obtains in other areas long known as "possessions of the United States" (R. 91). On the contrary, Guam, the Philippine Islands (now independent) and Puerto Rico were ceded outright to the United States by treaty with Spain, with the complete authority vested in a sovereign owner. 30 Stat. 1754, 1755; see *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 673-4; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 178. Likewise, by statute based on international law, guano islands which were appropriately discovered and occupied, and found not within the "lawful jurisdiction" of any other government, are

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military or naval purposes in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

"(3) upon any public work in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone) . . .;

"(4) under a contract entered into with the United State or any executive department, independent establishment or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in any public work . . ."

considered as "appertaining to" the United States (11 Stat. 119, 48 U.S.C. Sec. 1411-1412); that is, they are not "part of", but are appurtenant to and under the sovereignty of the United States, in the same sense as our other insular dependencies. See *Jones* v. *United States*, 137 U. S. 202, 212; *Downes* v. *Bidwell*, 182 U. S. 244, 277 *et seq.*; *Balzac* v. *Porto Rico*, 258 U. S. 298, 304-5; *Hooven & Allison Co.* v. *Evatt*, *supra*, 324 U. S. at 673-5. As for Tutuila, Manua and other Eastern Samoan islands, Germany and Great Britain renounced all their "rights and claims over and in respect to" those islands, in favor of the United States as "sovereign power", 31 Stat. 1878, 1879, and the native chiefs likewise ceded "absolutely and without reserve to the United States of America all rights of sovereignty" therein. 45 Stat. 1253. The cession was accepted, ratified and confirmed by Congress (*id.*, amended by 46 Stat. 3, 48 U.S.C. Sec. 1431a), as was done in the case of the Hawaiian Islands. 30 Stat. 750; see *Hawaii* v. *Mankichi*, 190 U. S. 197, 209. By joint resolution, Congress extended the sovereignty of the United States over Swains Island and placed it under the jurisdiction of the administrative and judicial authorities of the government established in American Samoa by the President of the United States. 43 Stat. 1357, 48 U.S.C. Sec. 1431. Notwithstanding varying forms of local autonomy granted by the United States: each of the foregoing, variously called a "possession", "insular possession" or "dependency", embraces an area over which the sovereignty of the United States is complete and undisputed, in all matters civil, political and military.

(b) In contrast, the bases here in question are solely military outposts on foreign soil, leased to the United

States only for security and defense purposes. This is made amply clear by the Exchange of Notes, the Leases and the Agreement.[3] No more was sought. No more should be held to have been granted or acquired. There was no surrender of sovereignty by the British Crown or acquisition of sovereignty by the United States. No reservoir of authority flowing from sovereignty is available for the exercise of control; the terms of the arrangements alone supply the basis for all authority exercised by the United States.

When the detailed terms and conditions of the Agreement are read as they must be in the light of the de-

[3] Lord Lothian's Note of September 2, 1940, expressed his Government's interest "in the national security of the United States" and their desire "to strengthen the ability of the United States to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere". Accordingly His Majesty's Government "will secure the grant to the Government of the United States, freely and without consideration, of the lease for immediate establishment and use of Naval and Air bases and facilities for entrance thereto and the operation and protection thereof". Executive Agreement Series 235, *Leased Naval and Air Bases*, pp. 14-15. In replying on behalf of the United States, Mr. Hull referred to the generous actions of His Majesty's Government "which are destined to enhance the national security of the United States and greatly to strengthen its ability to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere. It therefore gladly accepts the proposals". The note of Mr. Hull added that the United States "will immediately transfer to His Majesty's Government fifty United States Navy Destroyers . . ." *Id.*, pp. 15-16. The leases recite the undertaking of the note "to secure the grant to the United States of the lease of certain Naval and Air Bases and facilities"; and the United States "agrees that it will not during the term hereby granted use the Leased Area nor permit the use thereof except for the purposes specified". The Agreement of March 27, 1941, incorporated in each lease by reference, stresses the same fundamental approach of the two Governments. *Id.*, p. 1.

cleared purpose, each provision is entirely consistent with the limited military character of the rights acquired by the United States, and numerous provisions are inconsistent with and negate a grant of any other or broader character.[4] Although the United States acquired large powers to effectuate the military objective, the combination of the general over-all limitations to that purpose with the specific limitations respecting all matters unrelated to that purpose, serve graphically to

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[4] For example, the *limited* lifting of existing immigration laws (Art. XIII); the *limited* exemption from customs and duties (Art. XIV); the *limited* character of the postal facilities which might be established by the United States (Art. XVI; and see par. 3, letter by Ambassador Winant, dated Mar. 27, 1941, Executive Agreement Series 235, *supra*, p. 41); the *prohibition* against engaging in any business or professional activity, except such business as *post exchanges* and the like (Art. XVIII), against reselling food admitted free of customs (Art. XIV(4)), and against establishing a wireless station or landing a submarine cable in a Leased Area otherwise than for military purposes (Art. XV). Jurisdiction vested in the United States is limited to offences of a military nature or related to protecting the security and property of the base (Art. IV). Minerals and antiquities are reserved to the United Kingdom or local government, and the United States agrees to permit the exercise of fishing privileges within the Leased Areas "insofar as may be found compatible with military requirements" (Art. XXV). Only those laws of the local government which "*derogate from or prejudice any of the rights conferred on the United States*" are inapplicable (Art. XXIX) (italics supplied). Provision is made for modification of the terms of the Agreement after a reasonable time (Art. XXVIII). The United States is not obliged to exercise any right, power or authority granted (Art. III), but agrees not to "assign or underlet or part with the possession of the whole or any part of any Leased Area" (Art. XXIII). The United States may abandon any Leased Area or part thereof without obligation, presumably when the military necessity therefor is deemed passed; and, on the expiration of due notice, the area abandoned "shall revert to the Lessor" (Art. XXI).

emphasize the special character of the arrangements and to exclude the status of sovereignty heretofore understood by the term "possession of the United States". In the Fair Labor Standards Act Congress was exercising its sovereign legislative power. The power of the United States over the Leased Areas does not arise from sovereignty over them but from the terms of the international arrangements. It would seem clear therefore that the power thus far exercised by Congress in the Fair Labor Standards Act may not properly be construed as covering areas not embraced within the power exercised, nor can a contrary intention be imputed to Congress.

The court below in other respects (R. 90-91) misconstrued the powers of control vested in the United States by failing to take account of both the general and specific limitations of the arrangements. Its reference to the provision that a Leased Area is "not a part of the territory of the United States for the purpose of coastwise shipping laws" (Art. XI(4)) (R. 91) gives inappropriate weight to mere evidence of the natural desire of a great maritime nation to avoid any question that the authority granted the United States might be deemed to exclude British vessels from trade between the United States and the Leased Areas. No more meaning can properly be read into the specific exemption of coastwise shipping laws. On the contrary, in a later statute extending Navy courts-martial jurisdiction, Congress denominated Leased Areas generally as being "without the territorial jurisdiction" of the United States. 57 Stat. 41, approved March 22, 1943.

(c) Even if the question were more doubtful, it is submitted that the Circuit Court of Appeals should have affirmed the judgment of the District Court, which

was in harmony with the position of the executive branch of the Government. The President himself, far from claiming the Leased Areas as possessions of the United States, described them officially as "Army and Navy bases in British possessions in the Atlantic Ocean". Executive Order 8623 (Dec. 31, 1940), 6 F.R. 13. The Attorney General's opinion published with the Exchange of Notes and upholding the President's authority to consummate the arrangement, specifically referred to the "sovereignty retained by Great Britain" in the Leased Areas. 39 Op. Atty. Gen. 484, 485. The representatives of the British Government

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[5] *The Prime Minister (Winston Churchill)*: "President Roosevelt has recently made it clear that he would like to discuss with us, and with the Dominion of Canada and with Newfoundland, the development of American naval and air facilities in Newfoundland and in the West Indies. There is, of course, no question of any transference of sovereignty—that has never been suggested—or of any action being taken, without the consent or against the wishes of the various Colonies concerned, but for our part, His Majesty's government are entirely willing to accord defence facilities to the United States on a ninety-nine year leasehold basis, and we feel sure that our interest no less than theirs, and the interests of the Colonies themselves and of Canada and Newfoundland, will be served thereby". 364 Parliamentary Debates, House of Commons (Aug. 20, 1940) pp. 1170-1171.

The Secretary of State for Foreign Affairs (Viscount Halifax): "The fact that the leases are to be for a period of ninety-nine years ensures that this Agreement, concluded as I have said for the advantage of both parties, shall not be of a merely passing or ephemeral kind. No question of any transference of sovereignty arises, and the Governors of the territories in which concessions are being made, as also His Majesty's government in Canada, have been consulted at every stage and have fully concurred in what has been done. I think it is also true to say that from all the reports reaching me, the Agreement has been received with warm approval and cordiality by the peoples directly concerned. Cer-

and the United States[6] in the negotiations expressly recognized that no sovereignty was transferred.

No executive agency of the United States has contended the contrary. The Acting Legal Adviser of the Department of State has stated that "this government has not made any claim that the bases in Bermuda are territories or possessions of the United States" (R.

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tainly it is true that this Agreement stands in singular contrast to the more tortuous processes by which the totalitarian powers seek to enlarge their sphere of domination at the expense of others." 117 Parliamentary Debates, House of Lords (Sept. 5, 1940), p. 367.

[6] Hearings on H. R. 5096 [companion to S. 1642, approved August 16, 1941, 55 Stat. 622, *supra* note 2], Committee on the Judiciary, House of Representatives, 77th Cong., 1st Sess. (July 24, 1941):

Mr. Walter [Presiding member of the Committee, and in charge of the bill]. "Before going any further on that point, you were being careful to avoid the implication that there was a transfer of sovereignty".

Mr. Fahy [Assistant Solicitor General, and civilian United States representative in the negotiations]. "Yes; to a claim of a transfer of sovereignty. The opinion of the Attorney General, on the basis of which the President was convinced that he had the right to make the arrangements, said that sovereignty was not transferred, and Mr. Churchill, when he agreed to the arrangements and reported to the House of Commons about them, stated to the House of Commons that sovereignty would not be transferred. So we never departed from the position that the heads of the two governments had taken on that technical point".

Mr. Walter: "Then if there is no transfer of sovereignty, the only powers and rights that we had over that territory were those expressly given to us under the terms of the Agreement".

Mr. Fahy: "Either expressly or by implication, but they come from the agreement. We are not sovereign".

26). The Division of Territories and Island Possessions of the Department of Interior has not been vested with administration of the Leased Areas (R. 27). The Wage-Hour Division of the Department of Labor, charged with the administration and enforcement of the Fair Labor Standards Act, has published interpretations which have been outstanding continuously from the inception of the Act to the present date, and which have never included the Leased Areas or similar bases in the enumeration of "Territories and possessions" covered by the Act.[7] This evidences the clear intent of the Administrator to exclude them. Although fully cognizant of this and other litigation raising the question, the Administrator has reiterated this interpretation as recently as July 3, 1947.[8] Such interpretation by the Administrator is entitled to great weight. See *United States* v. *American Trucking Association*, 310 U. S. 534, 549. "The Administrator's policies . . . determine the policy which will guide applications for enforcement by injunction on behalf of the Government." Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at

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[7] "In Section 3(c) 'State' is defined as meaning 'any State of the United States, or the District of Columbia, or any Territory or possession of the United States.' Therefore, employees, within the District of Columbia, and the Territories and possessions (*Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands*), are dealt with on the same basis as employees working in any of the forty-eight States". *Interpretative Bulletin No. 2*, issued Oct. 17, 1938, repeated in "*General Statement on Coverage*", effective July 11, 1947. CCH Labor Service, par. 32,102; par. 31,852.01(c).

[8] 12 F. R. 4583, 4584. Sec. 776.1(c), quoted *supra* note 7.

variance only where justified by very good reasons". *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. Here, no reasons for variance appear, and many considerations of national and international policy call for uniformity as between private rights and public enforcement.

The exclusion of Leased Areas from coverage is in line with Section 17 of the Act, which vests civil jurisdiction to issue injunctions in the district courts of the United States, and in "the United States courts of the Territories and possessions". The Leased Areas are not properly included within the expression "Territory or possession", as used in this statute, since no civil courts of any kind have been established by Congress in the Leased Areas (R. 25), and there is no intention to do so.[9]

This conclusion is reinforced by other factors of weight in statutory construction. First, the Act does not purport to exhaust the Federal power, either over all employment subject to the commerce clause (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521-523; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 569-571), or the fullest application to all places subject to Federal juris-

[9] "The President has stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States". S. Rpt. 26 (by Mr. Walsh) on S. 303, Committee on Naval Affairs, U. S. Senate, 78th Cong., 1st Sess. The bill in question, S. 303, extending jurisdiction of naval courts-martial, was approved March 22, 1943. 57 Stat. 41, *supra* p. 12. In describing a similar measure in the preceding Congress, Chairman Walsh stated: "The bill seeks to give jurisdiction to naval courts over civilians employed by our naval organization in areas where no civil courts are available". 88 Cong. Rec. 9481, 77th Cong. 2d Sess.

diction.[10] Second, where Congress intended the Leased Areas to be covered, it has done so by express statutes, in the two instances of naval court-martial jurisdiction and the Longshoremen's and Harbor Workers' Compensation Act. *Supra*, pp. 7, 12. Third, no Congressional acquiescence was obtained or sought here on the basis that sovereignty was being acquired, and all official acts in the premises, executive and legislative, show that the United States contemplated and acquired only leaseholds for naval and air bases in British possessions, with the rights, powers and authority incident to their military purpose.

In all the circumstances, it is submitted that any doubt as to the construction of the statute should be resolved against its application to such military bases on foreign soil, with corresponding extension of sovereignty. It is submitted that such application should be made only by Congress, in the light of the situation existing at the time, and with the benefit of consultation with the executive departments particularly concerned with our international relations, insular affairs, national defense, and labor relations. The judiciary should be slow to decide that laws enacted without consideration of the factors here involved should be applied to such Leased Areas as "possessions of the United States". In any event, a decision to that effect

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[10] Employment within the Territories and possessions is not covered to the limit of Congress' plenary power therein, but on the same basis as employment in any of the 48 States. See Interpretative Bulletin No. 2, *supra* note 7. The Philippine Islands are excluded altogether because not expressly enumerated. 39 Stat. 547, 48 U.S.C. Sec. 1003. Special provision is made as to homework in the Virgin Islands and Puerto Rico: 54 Stat. 615, 616, 29 U.S.C. Sec. 205(e), 206.

should not remain unreviewed by this Court. Absent such review in this case the decision below, whatever the outcome on other possible issues on remand, will remain to vex the question which calls so strongly for the consideration and decision of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ prayed should be granted.

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February, 1948.

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SUPREME COURT, U.S.

No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., AND THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,
Petitioners,

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and documents involved	2
Statement	3
Specification of error to be urged	4
Summary of argument	5
Argument	9
I. The Leased Area in the British Crown Colony of Bermuda is not a "Territory or possession of the United States"	9
A. The terms "Territory" and "possession" of the United States apply only to areas over which the United States has sovereignty, and consequently do not embrace the Leased Areas	9
B. The Leased Area is merely a military outpost on British soil, and the authority of the United States therein is far more limited than in any area known as a "Territory or possession of the United States"	19
1. Background of the negotiations	19
2. The Exchange of Notes, Lease, and Agreement	23
3. Subsequent executive interpretation	28
(i) Department of State	28
(ii) Department of the Interior	30
(iii) Wage-Hour Division, Department of Labor	31
4. Subsequent history of the arrangements	32
5. Congressional intent indicated by Section 17 of the Fair Labor Standards Act	33
C. In every instance where legislative coverage of the Leased Areas was intended, Congress has expressly included such Areas, in addition to express coverage of the "Territories" and "possessions" of the United States	35
1. Workmen's compensation	37
2. War Damage Corporation	39
3. Navy court-martial jurisdiction	40
4. Conclusion	42

Page

D. Congressional authority over the Leased Areas arises from the international agreement negotiated subsequent to enactment of the Fair Labor Standards Act, and that Act may not be construed to cover areas not embraced in the sovereign legislative power then exercised, particularly since that Act did not even exhaust the authority then vested in Congress. 42

E. Any doubts should be resolved against construing the Leased Areas as a "Territory or possession" of the United States 44

1. Othe overseas bases of varying tenure, having conditions of use, occupation and control similar to Leased Areas 45

(i) Greenland 46
(ii) Guantanamo Naval Station 47
(iii) Other overseas bases 50

2. Prejudicial effect of a holding that Leased Areas are "possessions of the United States" 52

3. Conclusion 53

II. The Leased Area in the British Crown Colony of Bermuda is not otherwise within the coverage of the Fair Labor Standards Act 54

Conclusion 59

CASES:

Addison v. Holly Hill Fruit Products Co., 322 U. S. 607 ..54, 56
American Panana Co. v. United Fruit Co., 213 U. S. 347 ..18, 55
Benson v. United States, 146 U. S. 325 9
Bernhard v. Metcalf Construction Co., 64 F. Supp. 953 (D. Neb.) 45
Blackmer v. United States, 284 U. S. 421 55
Burns v. Metcalf, 69 F. Supp. 381 (W. D. Mo.) 45
Cameron Septic Tank Co. v. Knoxville, 227 U. S. 39 30
Cincinnati Soap Co. v. United States, 301 U. S. 308 ..... 12, 18
Clark v. Deckenbach, 274 U. S. 392 30
Dooley v. United States, 182 U. S. 222 16
Downes v. Bidwell, 182 U. S. 244 11
Filardo v. Foley Bros., 181 Misc. 136 (Sup. Ct. N. Y.) 45
Fleming v. Page, 9 How. 603 16
Galban v. United States, 40 Ct. Cl. 495 16
Greenstein v. Pan American Airways, 185 Mis. 429, (Sup. Ct. N. Y.) 45
Higgins v. Carr Bros. Co., 317 U. S. 572 58

Page

Hilton v. Sullivan, 334 U. S. 323 56
Hooven & Allison Co. v. Evatt, 324 U. S. 652 ..... 12, 13, 18
Jones v. United States, 137 U. S. 202 ..... 11, 30
Jordan v. Tashiro, 278 U. S. 123 30
Kirschbaum Co. v. Walling, 316 U. S. 517 58
Levinson v. Spector Motor Co., 330 U. S. 649 58
Luckenbach S. S. Co. v. United States, 280 U. S. 173 ..... 15, 44
McLeod v. Threlkeld, 319 U. S. 491 58
Morris v. McComb, 332 U. S. 422 58
Neely v. Henkel, 180 U. S. 109 16
Oetjen v. Central Leather Co., 246 U. S. 297 30
Pearcy v. Stranahan, 205 U. S. 257 30
Petrel Guano Co. v. Jarnette, 25 Fed 675 (E.D.N.C.) 11
Posadas v. National City Bank, 296 U. S. 497 12
Rassmussen v. United States, 197 U. S. 516 ..... 10, 12
Republic Aviation Corp. v. Lowe, 164 F. 2d 18, (C.C.A. 2d) *cert. den.*, 333 U. S. 845 ..... 16, 17
Skidmore v. Swift & Co., 323 U. S. 134 32
10 East 40th St. Co. v. Callus, 325 U. S. 578 58
Terrace v. Thompson, 263 U. S. 197 30
The Diamond Rings, 183 U. S. 176 ..... 12, 16
United States v. American Trucking Association, 310 U. S. 534 32
United States v. Belmont, 301 U. S. 324 30
United States v. Curtiss-Wright Export Corp., 299 U. S. 304 ..... 11, 18, 55
United States v. Flores, 289 U. S. 137 55
United States v. Fullard-Leo, 331 U. S. 256 9
United States v. Unzeuta, 281 U. S. 138 9
Walling v. Jacksonville Paper Co., 317 U. S. 564 58
Western Union Telegraph Co. v. Chiles, 214 U. S. 274 9
Western Union Co. v. Lenroot, 323 U. S. 490 58
Wilson v. Shaw, 204 U. S. 24 15

STATUTES:

Act of March 2, 1901, 31 Stat. 895, 897 ..... 47, 48
Act of August 29, 1916, 39 Stat. 547, 48 U. S. C. Sec. 1003 58
Act of August 13, 1940, 54 Stat. 784 34
Act of March 22, 1943, 57 Stat. 41 ..... 40, 41
Act of April 29, 1948, Public Law 505, 80th Cong. 2nd Sess. 35
11 Stat. 119, 48 U. S. C. Sec. 1411 *et seq.* 11
15 Stat. 539 10
30 Stat. 1754, 1755 12
31 Stat. 141 10
31 Stat. 656 16
31 Stat. 1878, 1879 10

Page

33 Stat. 2234 14
33 Stat. 2248, 2252 48
37 Stat. 512 10
39 Stat. 1706 42
41 Stat. 787, 10 U. S. C. Sec. 1473(d) 41
42 Stat. 858, 19 U. S. C. Sec. 121 49
44 Stat. 887, 22 U. S. C. Sec. 211(a) 45
45 Stat. 940, 1175, 39 U. S. C. Secs. 283, 654 45
46 Stat. 590, 708, 19 U. S. C. Secs. 1001, 1401(K) 45
48 Stat. 454, 18 U. S. C. Sec. 662b 16, 35
48 Stat. 1682, 1683 49
53 Stat. 79-81, 26 U. S. C. Secs. 251, 252 45
53 Stat. 2219 ..... 11, 35
54 Stat. 615, 616, 29 U. S. C. Sec. 205 (e), 206 58
55 Stat. 1560-1599 3
56 Stat. 176 39
57 Stat. 767 35
58 Stat. 683, 42 U. S. C. Sec. 201(g) 45
60 Stat. 1352 18
Defense Base Act, approved August 16, 1941, 55 Stat. 622, amended by Act of December 2, 1942, 56 Stat. 1028, 1035 ..... 38, 50
Fair Labor Standards Act, approved June 25, 1938, 52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*
2, 4, 6, 7, 31, 32, 33, 35, 36, 43, 44, 45, 50, 55, 56, 57, 58
Sec. 3(b) 2, 8, 54, 56
Sec. 3(c) 2, 35, 54, 56
Sec. 3(e) 57
Sec. 6 2
Sec. 7 2
Sec. 15(a) 56
Sec. 15(a)(1) 57
Sec. 17 ..... 33, 35
Federal Trade Commission Act, Sec. 4, 38 Stat. 730, 15 U. S. C. Sec. 44 56
Joint Resolution of July 7, 1898, 30 Stat. 750 10
Joint Resolution of March 4, 1925, 43 Stat. 1357, 48 U. S. C. Sec. 1431 11
Joint Resolution of February 20, 1929, 45 Stat. 1253 11
Amended by Act of May 22, 1929, 46 Stat. 3, 48 U. S. C. Sec. 1431a 11
Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, 44 Stat. 1424 ..... 37, 38, 39
National Labor Relations Act, as amended, Sec. 2(6), 49 Stat. 449, 29 U. S. C. Sec. 152(6) 56
Nationality Act of 1940, 54 Stat. 1138, 8 U. S. C. Sec. 501 *et seq.* 14, 15, 45

Page

Public Law 204, 80th Cong. 1st Sess. 17
Public Utility Holding Company Act of 1935, Sec. 2(a)(28), 49 Stat. 804, 15 U. S. C. Sec. 79b(a)(28) 56
Tariff Act of 1922 49
United Nations Charter, 59 Stat. 1033 ..... 17, 51
Art. 43 51
Art. 73(e) 15, 30
5 U. S. C. Sec. 133t, note, Reorganization plan II, Sec. 4(d) 30

MISCELANEOUS:

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Par. 24,102.01 31
Par. 24,475; Interpretative Bulletin No. 2, October 17, 1938 ..... 31, 58
General Statement on Coverage, July 3, 1947 31
Congressional Record, Vol. 78, pp. 4982-4983 35
Congressional Record, Vol. 88, p. 965 39
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Congressional Record, Vol. 88, p. 9481 34
Cuba, Lease Agreement with United States, July 2, 1903 ..48, 49
Department of the Air Force, Release No. 18 (August 25, 1948) 51
Department of State, Press releases December 10, 1947, December 23, 1947, and February 20, 1948 53
Department of State, Release No. 118 (February 13, 1948) .. 51
14 *Department of State Bulletin* (1946) 51
18 *Department of State Bulletin* (1948) 53
Exec. Q. 73d Cong., 2d Sess. 49
Executive Agreement Series 204, Department of State (1941) 46, 47
Executive Agreement Series 232, Department of State (1942) 51
Executive Agreement Series 235, Leased Naval and Air Bases, Department of State (1942)
2, 3, 4, 7, 8, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 35, 36, 37, 38, 39, 42, 43
Federal Register, Vol. 12, p. 4583, 4584, Sec. 776.1(c) 31
Hackworth, Digest of International Law
Vol. 1, p. 427 16
Vol. 2, p. 172 15
Vol. 3, p. 9 49
Vol. 4, p. 22 49
Vol. 5, pp. 259-260 30

Page

H. Doc. 378, 80th Cong. 1st Sess. 17
H. Doc. 943, 76th Cong. 3rd Sess. 21
H. R. 5096, 77th Cong. 1st Sess. 38
H. R. 6382, 77th Cong. 2d Sess. 39
H. Rep. 1070, 77th Cong. 1st Sess. 38, 50
H. Rep. 1704, 80th Cong. 2d Sess. 35
Hearing on H. R. 5096, Committee on Judiciary, House of Representatives, 77th Cong. 1st Sess. (July 24, 1941) 22, 37
Hearings on H. R. 6382 and S. 2198, House of Representatives, 77th Cong. 2d Sess. 40
Hearings on S. 2198, Committee on Banking and Currency, U. S. Senate, 77th Cong. 2d Sess. 40
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Vol. I 20, 21
Vol. II 46, 50, 52
1 *Hyde, International Law* (1945 ed.) 11, 49
Information on American Samoa transmitted by the United States to the United Nations (1947) 10
Information on Guam transmitted by the United States to the United Nations (1947) 13
Information on Puerto Rico transmitted by the United States to the United Nations (1947) 13
Information on the Territory of Alaska transmitted by the United States to the United Nations (1947) 10
Information on the Territory of Hawaii transmitted by the United States to the United Nations (1947) 10
Information on the Virgin Islands transmitted by the United States to the United Nations (1947) 12
1 *Malloy, Treaties* (1910) 48
1 *Moore, Digest of International Law* (1906) 11

New York Times

March 7, 1943 52
April 21, 1944 32
June 13, 1944 52
January 15, 1948 51

Opinion of Attorney General

Vol. 34, p. 507 11
Vol. 35, p. 536 ..... 15, 49
Vol. 39, p. 484 21
Vol. 40, No. 10 (April 15, 1941) 15

Oppenheim's International Law (6th ed. by Lauterpacht) 27
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Parliamentary Debates, House of Commons, Vol. 364 20
Parliamentary Debates, House of Commons, Vol. 399 33

Page

Parliamentary Debates, House of Lords, Vol. 117 (September 5, 1940) 20
S. 2198, 77th Cong. 2d Sess. 39
S. Rep. 26, 78th Cong. 1st Sess. 34, 41
S. Rep. 536, 76th Cong. 1st Sess. 34
S. Rep. 1012, 77th Cong. 2d Sess. 39
S. Rep. 1811, 77th Cong. 2d Sess. 34
Summary of Information transmitted by the Government of the United States of America (UN Release A 320, 25 a July 1947) 15
The United States and Non-Self-Governing Territories (GPO 1947) 15, 17
Treaties and Other International Acts Series 1566 Department of State (1947) 51
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., NEGARO COMPANY, INC., AND THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS, *Petitioners*,

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTEMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 59-62) is reported at 73 F. Supp. 860. The opinion of the United States Court of Appeals for the Second Circuit (R. 65-73) is reported at 164 F. 2d 924.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 28, 1947 (R. 73). The petition for a writ of certiorari was filed on February 19, 1948, and was granted on March 29, 1948 (R. 75). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the naval and air base located in the Crown Colony of Bermuda and held by the United States under lease from the British Government for the purposes specified in the Lease and in the Notes exchanged between the two governments on September 2, 1940, with the rights, powers and authority and on the terms and conditions contained in the Agreement between the two governments signed March 27, 1941, is a "Territory or possession of the United States," with the consequence that the Fair Labor Standard Act of 1938 applies thereto.

STATUTE AND DOCUMENTS INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*) applies, with certain exceptions not here material, to any employee who is "engaged in commerce or in the production of goods for commerce." §§ 6, 7.

Section 3 defines the relevant terms as follows:

> "(b). 'Commerce' means trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof.
>
> "(c). 'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States."

The Exchange of Notes, Lease and Agreement between the United States and His Majesty's Government in the United Kingdom (55 Stat. 1560-1599) are set forth in the printed document separately filed with this brief for the convenience of the Court, entitled *Executive Agreement Series* 235, *Leased Naval and Air Bases, Department of State* (1942).

STATEMENT

Petitioners were jointly engaged in the construction of an Outlying Defense Base known as Fort Bell and Kindley Field in Bermuda, a British Crown Colony. Petitioners were so engaged under a cost-plus-a-fixed-fee contract with the Corps of Engineers, United States Army (R. 13-15). The construction work and the services of the employees here involved were performed exclusively in the area, called the Leased Area, held by the United States under ninety-nine-year lease from the British Government, pursuant to the Exchange of Notes between the two governments dated September 2, 1940, and the Agreement between the two governments signed at London, March 27, 1941, hereinafter more fully discussed. Suit was initiated against petitioners in the Supreme Court of New York by eleven employees engaged by petitioners to perform the duties of policemen and fire-patrolmen protecting original construction work in the Leased Area (R. 2-8). They sued claiming coverage under the provisions of the Fair Labor Standards Act of 1938 for overtime compensation, liquidated damages and attorneys' fees. *Id.*. Following removal of the case to the United States District Court for the Southern District of New York, petitioners denied the pertinent allegation of the complaint (R. 8-9), pleaded as a separate defense that the plaintiffs were not covered by the Act (R. 9), and

moved for summary judgment (R. 12). Various affidavits and depositions were filed by the parties on this motion (R. 13-58). The District Court granted summary judgment for the petitioners, holding that the Act "had no application to the employment of the plaintiffs in the Leased Areas of Bermuda," because none of those areas was a Territory or possession of the United States within the meaning of the Fair Labor Standards Act. The District Court noted that it was not contended that the area is a "Territory" of the United States, and rejected the contention that it is a "possession" (R. 59 *et seq.*). On appeal the United States Court of Appeals for the Second Circuit reversed (A. N. Hand, Clark and Frank, C. JJ.). It stated the question as follows: "The District Court ruled that none of the leased areas of Bermuda where the construction work of the defendants was being performed was a 'Territory or possession of the United States' within the meaning of the Act. Our question is therefore as to the correctness of this ruling and specifically whether or not the leased area is a 'possession' within the statutory meaning." (R. 66). The Court of Appeals held that it was and remanded the case to the District Court.

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that the naval and air base in Bermuda leased to the United States by the British Government under and in accordance with the terms of the Lease, the Exchange of Notes dated September 2, 1940, and the Agreement dated March 27, 1941, between the two governments, is a "possession of the United States" and, therefore, within the coverage of the Fair Labor Standards Act.

SUMMARY OF ARGUMENT

I. The Leased Area in the British Crown Colony of Bermuda is not a "Territory or possession of the United States", on each of the following grounds:

First, "Territory" and "possession" are obviously used as words of art rather than descriptions of interests in realty. The terms comprehend only those areas outside the continental United States which are under American sovereignty; e. g., Alaska, Hawaii, Guam, Samoa. Since sovereignty in the Leased Area is retained by His Majesty's Government, it is not a "Territory or possession of the United States" in the sense intended by Congress in this and other statutes. The Leased Area is rather an American military outpost in a British possession,—a place subject to the use, occupation and control of the United States for a limited military purpose.

Second, the authority of the United States in the Leased Areas, contrary to the view of the court below, is far more restricted than in any area known as a "Territory or possession of the United States." Analysis of the background of the negotiations, the Exchange of Notes, Agreement and Lease, shows that the United States annexed no territory, assumed no responsibility for civil administration of the Leased Areas, and was granted authority carefully restricted to the defense and military objectives of the undertaking. The limited powers and status granted fall far short of those enjoyed in our "Territories" and "possessions".

This is expressly recognized by all the executive agencies concerned with the problem. The Department of State has specifically advised this Court that the limitations on American authority under the arrangements are inconsistent with the concept of "posses-

sions" as applied to such areas as Guam, Samoa or the guano islands, among others cited in the opinion below. Nor has the President vested the administration of the Leased Areas in the Department of Interior or any other executive agency, as in the case of "possessions" or "Territories". Moreover, the Fair Labor Standards Act itself has not been administratively construed to cover the Leased Areas, and consequently the vast construction work already done on these bases was carried forward on the understanding the Act did not apply. The Wage-Hour Division of the Department of Labor did not include any military bases abroad in its official administrative interpretations of the term "Territory or possession" issued in 1938, and the Administrator persisted in excluding the Leased Areas or like bases in a "general statement on coverage" issued in 1947. In fact, the Solicitor General has filed a memorandum in support of the petition for certiorari, arguing that the judgment below is erroneous and should be reversed.

Third, in the three instances where legislative coverage of the Leased Areas was intended, Congress has expressly included such Areas, in addition to express coverage of Territories or possessions of the United States. This conforms to the understanding of the draftsmen of the Agreement that apart from matters specifically covered, Congress would subsequently determine whether particular statutory controls and regulations should be extended to the Leased Areas and whether such controls and regulations were within the authority granted. Against this uniform legislative pattern, it is most significant that Congress has not seen fit to extend coverage of the Fair Labor Standards Act to the Leased Areas in the seven years that have elapsed since the United States acquired such authority as it has over those Areas.

Fourth, Congressional authority over the Leased Areas, arising solely from the Agreement, Lease, and Exchange of Notes, differs significantly from and is far more limited than the authority exercised in enacting the Fair Labor Standards Act of 1938; namely, the legislative power over the sovereign domain of the United States. Congress was not acting in 1938 as a legislative body for the Leased Areas, nor has it yet addressed itself to the issues of international, military, and labor relations involved in a decision whether to extend the Act to those Areas. The Act may not properly be construed as covering Leased Areas, which are not embraced in the authority exercised. The contrary intent may not be imputed to Congress particularly where, as here, the Act did not even exhaust the authority exercised either over interstate commerce or the Territories and possessions of the United States.

Finally, we submit that any doubt should be resolved against construing the Leased Areas as a "Territory, or possession of the United States". The Act does not give those terms by definition or enumeration a meaning restricted to the purposes of this particular statute. The affirmance of the judgment below would have unanticipated and adverse implications regarding other military bases indistinguishable in principle from the Leased Areas. Notwithstanding variations in location, tenure and other details of our rights in American military bases throughout the world, the problems arising from their use, occupation and control are surprisingly similar. As the Department of State has advised this Court, privileges by international agreement regarding immigration, taxation, customs, post exchanges and the like are being or have been enjoyed by members of our armed forces or other government personnel in many

foreign lands without any suggestion, until the opinion below was rendered, that the foreign sovereign thereby surrendered its sovereignty or bargained away its possessions. Consequently a holding that the Leased Areas are "possessions" of the United States might well be detrimental to our relations with foreign countries in which military bases are now held or in which they might in future be sought. The decision to extend the Act to the Leased Areas, if valid under the Agreement, should be made only by Congress, with the benefit of consultations with the executive departments particularly concerned with our foreign relations, insular affairs, national defense and labor relations.

II. Respondent's Opposition to the petition for certiorari appears to abandon the ground of the decision below that the Leased Area is a "possession of the United States", and presents the wholly new argument that the Area is covered as "a place outside" any State, under the language of Section 3(b) which defines "commerce" to mean traffic or communication "from any State to any place outside thereof". This construction is untenable. The phrase in Section 3(b) merely embraces employees producing or shipping goods from any State (including any Territory or possession) to any place outside thereof, anywhere in the world. Respondents mis-read the phrase to embrace employees at the foreign destination point. Obviously the Act does not even cover American citizens so employed in foreign lands, any more than it covers employees doing original construction work in such lands.

The power of Congress to cover such employees, whether in Europe, Canada or the Leased Areas, is not in issue here. The Fair Labor Standards Act, unlike some other Congressional enactments, does not extend

to the furthest reaches of Federal authority, either over interstate or foreign commerce or the Territories or possessions of the United States.

ARGUMENT

I

THE LEASED AREA IN THE BRITISH CROWN COLONY OF BERMUDA IS NOT A "TERRITORY OR POSSESSION OF THE UNITED STATES".

A. THE TERMS "TERRITORY" AND "POSSESSION" OF THE UNITED STATES APPLY ONLY TO AREAS OVER WHICH THE UNITED STATES HAS SOVEREIGNTY, AND CONSEQUENTLY DO NOT EMBRACE THE LEASED AREAS.

The meaning and application of the phrase "Territory or possession of the United States" in statutes of the United States will not be found in dictionary definitions of terms used to describe mere title to real property, *cf. United States* v. *Fullard-Leo*, 331 U.S. 256, or governmental interests akin to that in military reservations on American soil. *Cf. United States* v. *Unzeuta*, 281 U. S. 138, 142; *Benson* v. *United States*, 146 U. S. 325; *Western Union Telegraph Co.* v. *Chiles*, 214 U. S. 274. Words such as "Territory," "possession" and "United States" are used by Congress in a political, constitutional or, at times, in an international sense. Their meaning and application must be drawn from executive, legislative and judicial usage and from the theory and conduct of American domestic and foreign affairs under the Constitution and the law of nations, interpreted in conformity with the decisions of this Court.

It is essential at the outset, therefore, to review the relationship between the United States and the various areas throughout the world long known as its "Territories" or "possessions," in order to know the Con-

gressional intent in using the terms in the statutes of the United States. As will be seen, the fundamental characteristic in each instance is American sovereignty.

Alaska was ceded to the United States by treaty with Russia, transferring "all the territory and dominion now possessed by his Majesty [the Emperor of Russia] on the continent of America and . . . adjacent islands . . : The eastern limit is the line of demarcation between the Russian and the British possessions in North America." 15 Stat. 539; see *Rassmussen* v. *United States*, 197 U. S. 516, 521-525. The Territory of Alaska was established by Act of Congress in 1912 (37 Stat. 512), and is classified as an "incorporated territory of the United States." *Information on the Territory of Alaska transmitted by the United States to the United Nations* (1947) p. 7.

The Hawaiian Islands were annexed by joint resolution of Congress with the consent of the Republic of Hawaii, "as a part of the Territory of the United States and subject to the sovereign dominion thereof." 30 Stat. 750. The Territory of Hawaii was established by Act of Congress in 1900 (31 Stat. 141); and is classified as an "incorporated organized territory of the United States." *Information on the Territory of Hawaii transmitted by the United States to the United Nations* (1947) p. 4.

American Samoa is classified as an "unorganized United States possession." *Information on American Samoa transmitted by the United States to the United Nations* (1947) p. 5. Germany and Great Britain renounced all their "rights and claims over and in respect to" Tutuila, Manua and other Eastern Samoan islands in favor of the United States as "sovereign power" (31 Stat. 1878, 1879), and the native chiefs likewise ceded "absolutely and without reserve

to the United States of America all rights of sovereignty" therein. 45 Stat. 1253. The cession was accepted, ratified and confirmed by Congress. *Id.*, amended by 46 Stat. 3, 48 U. S. C. § 1431a. By joint resolution, Congress extended "the sovereignty of the United States" over Swains Islands, and placed it under the jurisdiction of the administrative and judicial authorities of the government established in American Samoa by the President of the United States. 43 Stat. 1357, 48 U. S. C. § 1431.

Guano islands which are appropriately discovered and occupied, and found not within the "lawful jurisdiction" of any other government, may be proclaimed by the President to be "appertaining to the United States" (11 Stat. 119, 48 U. S. C. § 1411-1412), on the basis that sovereign "dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest." See *Jones* v. *United States*, 137 U. S. 202, 212; *Downes* v. *Bidwell*, 182 U. S. 244, 306-307; *United States* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 318; 1 *Hyde, International Law* (1945 ed.) p. 346; 34 Op. Atty. Gen. 507 (1925); Orent and Reinsch, *Sovereignty Over Islands in the Pacific* (1941) 35 Am. J. Int. Law 443, 453-454, 461; 1 *Moore's Digest of International Law* (1906) pp. 558-580. Transportation of guano from such islands to the mainland is "regulated as in the coasting trade between different parts of the United States". 11 Stat. 120, 48 U. S. C. § 1416; see *Petrel Guano Co.* v. *Jarnette*, 25 Fed. 675, 676-677 (E. D. N. C.)[1]

[1] Compare the Pacific coral atolls of Canton and Enderbury, claimed by both the United States and Great Britain, which were placed under condominium or joint administration of the two countries in 1939. 53 Stat. 2219. The United States has also proposed international administration of Antarctica, to resolve conflicting claims of various nations based on discovery and other acts.

The Virgin Islands were ceded by the Kingdom of Denmark, which transferred all "territory, dominion and sovereignty" therein. 39 Stat. 1706. The islands "have the status of an organized but unincorporated territory of the United States." *Information on the Virgin Islands transmitted by the United States to the United Nations* (1947) p. 5.

Guam, the *Philippine Islands* (now independent) and *Puerto Rico*, formerly under Spanish sovereignty, were ceded to the United States by treaty, 30 Stat. 1754, 1755, and thereby "came under the complete and absolute sovereignty and dominion of the United States." See *The Diamond Rings*, 183 U. S. 176, 179. The Philippines, for example, although not "incorporated in" the United States, were held "under the sovereignty of the United States as a possession or dependency." See *Rassmussen* v. *United States*, 197 U. S. 516, 521. These islands "constituted a dependency, for they were not possessions merely, but possessions held by right of cession from Spain and over which the United States undoubtedly had supreme powers of legislation and government." See *Posadas* v. *National City Bank*, 296 U. S. 497, 502; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 314. And in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, this Court, in an opinion by Chief Justice Stone, said of all the areas ceded after the war with Spain:

> "That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima* v. *Bidwell*, *supra*; *Dooley* v. *United States*, *supra*, 182

U. S. 222; *Downes* v. *Bidwell*, 182 U. S. 244; *Dooley* v. *United States*, 183 U. S. 151; and see also *Public Utility Commissioners* v. *Pinchausti & Co.*, 251 U. S. 401, 406-407; *Balzac* v. *Porto Rico*, *supra*. This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by Section 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States'. *Dooley* v. *United States*, *supra*, 183 U. S. at 157; *Dorr* v. *United States*, 195 U. S. 138, 149; *Balzac* v. *Porto Rico*, *supra*, 305; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 323." 324 U. S. 652, 673-674.[2]

Mr. Justice Reed, while dissenting in part on another ground, said in the *Ecatt* case:

> "Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their foreign character and become a part of the territories of the victor. The United States has been content to leave its possessions with a large measure of self-government." 324 U. S. at 681-682.

[2] See also *Information on Guam transmitted by the United States to the United Nations* (1947) p. 5; *Information on Puerto Rico transmitted by the United States to the United Nations* (1947) pp. 4-7.

The Nationality Act of 1940 defines the terms "United States" and "outlying possessions" as follows, when used in that Act:

> "(d) The term 'United States' when used in a geographical sense means the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States.
>
> "(e) The term 'outlying possessions' means all territory, other than as specified in subsection (d), over which the United States exercises rights of sovereignty, except the Canal Zone." (§ 101, 54 Stat. 1137, 8 U. S. C. § 501.)

Thus, although differences persist in the application of particular constitutional provisions to such insular areas not "incorporated in" the Union of States, depending upon the nature of the provision in question, the terms "possession," "insular possession" and "dependency" are used uniformly to describe their status when under the sovereignty of the United States.

The Panama Canal Zone, obtained by treaty with the Republic of Panama (33 Stat. 2234), is generally recognized as an anomalous case. Article 2 of the treaty ". . . grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal." By Article 3, Panama "grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority." Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal. It is hypercritical to contend that the title of the United

In line with this long-established principle, military bases abroad occupied by or available to American forces have not been deemed "possessions of the United States", but rather areas subject to the use, occupation and control of the United States for the particular military purpose. See 35 Op. Atty. Gen. 536, 540-541; *infra*, p. 49, n. 15. Sovereignty is regarded as "too important a matter" to pass with a lease. See Wilson, *Leased Territories* (1940) 34 Am. J. Int. Law p. 704.

States is imperfect, and that the territory described does not belong to this nation." *Wilson* v. *Shaw*, 204 U. S. 24, 33. See also 40 Op. Atty. Gen. No. 10 (April 16, 1941); 2 *Hackworth, Digest of International Law*, p. 172; Nationality Act of 1940, § 203(a), 54 Stat. 1138; *cf. Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173.

The United States included the Canal Zone among the "non-self-governing territories" on which reports were filed in 1946 with the United Nations under Article 73(e) of the Charter. See *United Nations, Non-Self-Governing Territories, Summaries of Information Transmitted to the Secretary General during 1946* (UN publication 1947) p. 101. The Panamanian Delegation voiced objection in the General Assembly on November 14, 1946, arguing that sovereignty over the Canal Zone resides in the Republic of Panama. *The United States and Non-Self-Governing Territories* (GPO, 1947) p. 21, note 1. In view of this statement, the Department of State did not transmit such information in 1947 "pending clarification of this question with the Republic of Panama." The Department of State added: "It is recalled that the General Assembly during the Second Part of the First Session agreed not to attempt, for the time being, the task of establishing criteria for determining the territories which are non-self-governing territories within the meaning of Article 73(e) of the Charter. Therefore, the United States, as last year, is transmitting information on the basis of a purely pragmatic approach to this question and without prejudice as to the territories on which information will in future be sent." *Summary of Information transmitted by the Government of the United States of America* (UN Release A 320, 25 July 1947) p. 1. See also *United Nations, Non-Self Governing Territories, Summaries of Information Transmitted to the Secretary General during 1946* (UN publication 1947), pp. 134, 101-129.

Also excluded from the accepted understanding of the term "possession of the United States", are other areas likewise not ceded to the United States or otherwise under American sovereignty, such as the parts of Germany, Japan and Korea occupied by and hence temporarily in the possession of American armed forces, regardless of the indefinite duration of our occupation or the sweeping authority exercised under the war power. *Cf. The Diamond Rings*, 183 U. S. 176, 178; *Dooley* v. *United States*, 182 U. S. 222, 233-234; *Neely* v. *Henkel*, 180 U. S. 109, 119-120; *Fleming* v. *Page*, 9 How. 603, 614-618; *Republic Aviation Corp.* v. *Lowe*, 164 F. 2d 18, 20 (C. C. A. 2d) *cert. den.*, 333 U. S. 845; *Galban* v. *United States*, 40 Ct. Cl. 495, 507-509. This plainly follows from the principle that "conquest . . . becomes a mode of acquisition of territory—and hence a transfer of sovereignty—only if the conquered territory is effectively reduced to possession and annexed by the conquering state." 1 *Hackworth, Digest of International Law*, p. 427.[4]

By the same token, it has not been supposed that the United States acquired a "possession" when it assumed responsibility from the Security Council of the United Nations as "administering authority" of

[4] For example, Cuba under American occupation following its liberation from Spain was deemed a "foreign country or territory . . . occupied by or under the control of the United States", under an amendment to the extradition laws designed to cover that situation. See 31 Stat. 656; *Neely* v. *Henkel*, 180 U. S. 109, 119-120. A subsequent amendment extended the extradition statute to apply "in any country where the United States exercises extraterritorial jurisdiction for the arrest and removal therefrom to the United States, its Territories, Districts, or possessions, including the Panama Canal Zone and the Philippine Islands, or any other territory governed, occupied, or controlled by it". 48 Stat. 454, 18 U. S. C. § 662b.

the "Trust Territory of the Pacific," comprising the former Japanese mandated Marshall and Caroline Islands and the Marianas (except Guam). *The United States and Non-Self-Governing Territories* (1947) pp. 54-57; 59 Stat. 1033, 1048-1049; Public Law 204, 80th Cong., 1st Sess. The basis of American administration is "trusteeship rather than annexation". H. Doc. 378, 80th Cong., 1st Sess., p. 8. The authority granted does not imply American sovereignty over the trust territory. *Id.*, pp. 13, 16.

In contrast with the situations above described, it is manifest that as the Department of State has advised this Court, the arrangements under which the Leased Areas were obtained "did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States" (Memorandum filed by the Solicitor General in support of the petition for certiorari, p. 8). Our interest in the Leased Areas arises solely from the bilateral agreement with His Majesty's Government which retains sovereignty, as will be shown more fully hereinafter, pp. 19-22, 33. It follows from the foregoing that the Leased Areas are not "Territories" or "possessions" of the United States.

The court below conceded that the Leased Areas involved no transfer of sovereignty, *Republic Aviation Corp.* v. *Lowe*, 164 F. 2d 18, 20 (C. C. A. 2d), L. Hand, Swan and Chase, JJ., *cert. den.*, 333 U. S. 845,[5] and there is no conflict on that question between His Majesty's Government and the United States. Nor is the

[5] "... as to those [bases] we got from Great Britain, it has not yet been established that there was any cession of territory which involved a transfer of sovereignty. Rather, there was a so-called lend lease [sic] transaction under which the United States became the lessee for a term."

opinion of the court below to the contrary. The court failed, however, to draw the necessary conclusion that the Leased Area is not a "Territory or possession." The court supported its failure so to do by the erroneous supposition that the Leased Areas are subject to "fully as complete control by the United States" as obtains in other areas long known as "possessions of the United States" (R. 68), citing the Philippine Islands, Guano Islands, Swains Island, American Samoa, and Guam.

In the first place, "sovereignty is never held in suspense," see *United States* v. *Curtiss-Wright Co.*, 299 U. S. 304, 317; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358, and in each of the instances cited by the court below, as we have already demonstrated, the United States is sovereign and therefore enjoys the unlimited powers of sovereignty. In all these instances, as well as the others analyzed above, pp. 10-14, there are no "diverse degrees of sovereignty" or condominium, as the court below mistakenly assumed (R. 68), but only varying degrees of local self-government granted by the United States *as sovereign*. Thus the United States was sovereign in the Philippine Islands until they became independent on July 4, 1946; only by this final act of independence did the islands cease to be a "possession" of the United States. 60 Stat. 1352; see *Hoover & Allison Co.* v. *Evatt*, 324 U. S. 652, 675-676; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 319.

In the second place, analysis of the historical background of the arrangements for the Leased Areas and of the documents underlying American rights therein, demonstrates that the United States does not enjoy "fully as complete control" over the Leased Areas as

in the possessions cited by the court below. We now turn to that analysis.

B. THE LEASED AREA IS MERELY A MILITARY OUTPOST ON BRITISH SOIL, AND THE AUTHORITY OF THE UNITED STATES THERE IN IS FAR MORE LIMITED THAN IN ANY AREA KNOWN AS A "TERRITORY OR POSSESSION OF THE UNITED STATES."

The international arrangements for naval and air bases in Bermuda are indistinguishable for present purposes from those made simultaneously for like bases in Newfoundland, St. Lucia, Antigua, Jamaica, Trinidad and British Guiana. Three basic international papers are involved in each instance,—the Exchange of Notes, the Lease and the Agreement. All the official pronouncements by the two governments and the principal actors in the arrangements, during and subsequent to the negotiations, negative any implication that a "Territory" or "possession" was being transferred by His Majesty's Government and acquired by the United States.

1. *Background of the negotiations*

The British Prime Minister, Rt. Hon. Winston Churchill, reported as follows to the House of Parliament on August 20, 1940:

> "President Roosevelt has recently made it clear that he would like to discuss with us, and with the Dominion of Canada and with Newfoundland, the development of American naval and air facilities in Newfoundland and in the West Indies. *There is, of course, no question of any transference of sovereignty—that has never been suggested*—or of any action being taken, without the consent or against the wishes of the various Colonies concerned, but for our part, His Majesty's Govern-

ment are entirely willing to accord defense facilities to the United States on a ninety-nine year leasehold basis, and we feel sure that our interest no less than theirs, and the interests of the Colonies themselves and of Canada and Newfoundland, will be served thereby". [Italics supplied.] 364 *Parliamentary Debates, House of Commons*, 1170-1171.[6]

Secretary of State Cordell Hull has recorded how and why the United States' objective in the transaction had changed from outright purchase of the areas to that of 99 year leaseholds:

"He [the President] also knew the penurious condition of the native populations of most of the islands, and consequently did not want to assume the burden of administering those populations. Therefore he had changed . . . from his original idea of outright purchase of the bases to that of ninety-nine year leases. I had originally favored outright cession, but was willing to

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[6] Viscount Halifax, then British Secretary of State for Foreign Affairs, also advised the House of Lords:

"*No question of any transference of sovereignty arises*, and the Governors of the territories in which concessions are being made, as also His Majesty's government in Canada, have been consulted at every stage and have fully concurred in what has been done. I think it is also true to say that from all the reports reaching me, the Agreement has been received with warm approval and cordiality by the peoples directly concerned. Certainly it is true that this Agreement stands in singular contrast to the more tortuous processes by which the totalitarian powers seek to enlarge their sphere of domination at the expense of others." [Italics supplied]. 117 *Parliamentary Debates, House of Lords* (Sept. 5, 1940), p. 367.

agree to leases instead". 1 *Hull, Memoirs* (1948) p. 834.

President Roosevelt's historic message to the Congress on September 3, 1940, making public the Exchange of Notes, stated only that the United States thereby "acquired the right to lease naval and air bases" at enumerated British Empire points in the Western Hemisphere. The President's message also transmitted an Opinion of the Attorney General upholding the President's authority to consummate the arrangement, and setting forth the following "essential characteristics" of the proposal:

> "The acquisition consists only of rights, which the United States may exercise or not at its option, and if exercised may abandon without consent. *The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use with the sovereignty retained by Great Britain. Our Government assumes no responsibility for civil administration of any territory.* It makes no promise to erect structures, or maintain forces at any point. It undertakes no defense of the possessions of any country. In short it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance" [italics supplied]. 39 Op. Atty. Gen. 484, 485; H. Doc. 943, 76th Cong. 3rd Sess., p. 5.

The essentially military purpose and character of the arrangements were uppermost in the negotiations

leading to the Agreement and Leases. See *Winant, Letters from Grosvenor Square* (1948) pp. 33-38. The Assistant Solicitor General, who had served as civilian representative on the United States Commission which negotiated the Agreement and Leases, stated to the Judiciary Committee of the House of Representatives that on the issue of sovereignty, the United States commissioners "never departed from the positions that the heads of the two governments had taken"; namely, that "sovereignty was not transferred". *Hearings on H.R. 5096*, 77th Cong. 1st Sess. (July 24, 1941), Tr. p. 25. He testified further:

> "We had several definite objectives. The first, I should say the principal one, was that the United States should have all the power *by agreement* in this document that was eventually signed, necessary to have complete control in the bases themselves, *primarily from the military standpoint, because they were a part of a defense scheme . . . We were not going down there for purposes other than in connection with defense.*
>
> "The second basic principle upon which our Government acted was that in doing so we should not be put to financial loss, other than the compensation agreed upon originally in the exchange of notes, through the imposition upon our personnel on the bases, either military or civilian, of customs, taxes and licenses, and things of that sort . . .
>
> "Now third, and equal if not of greater importance, was that . . . at a time when we were at war, we should not only have the rights given us by the agreements in ordinary times, to construct and maintain and keep up the bases, but that we

should do anything we wanted to *from a military stand point* in the whole of the Territory; and that eventuated in Article 2, which became known as the war article or the emergency article. . . .

"Now, we did not desire to approach the problem primarily from the standpoint of civil administration on the bases . . . Certain specific matters were raised in addition to those primary points that I have mentioned, which had to be settled because question was raised about them" [italics supplied]. *Id.*, pp. 22-23.

2. *The Exchange of Notes, Lease, and Agreement*

Lord Lothian's Note of September 2, 1940, expressed his Government's interest "in the national security of the United States" and their desire "to strengthen the ability of the United States to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere". Accordingly His Majesty's Government "will secure the grant to the Government of the United States freely and without consideration, of the lease for immediate establishment and use of Naval and Air bases and facilities for entrance thereto and the operation and protection thereof". *Executive Agreement Series* 235, *Department of State* (1942), pp. 14-15. In replying on behalf of the United States, Mr. Hull referred to the generous actions of His Majesty's Government "which are destined to enhance the national security of the United States and greatly to strengthen its ability to cooperate effectively with the other nations of the Americas in the defense of the Western Hemisphere. It therefore gladly accepts the proposals". The note of Mr. Hull added that the United States "will immediately

transfer to His Majesty's Government fifty United States Navy Destroyers . . ." *Id.*, p. 15-16.

The Lease recites the undertaking of the Notes "to secure the grant to the United States of the lease of certain Naval and Air Bases and facilities"; and the United States "agrees that it will not during the term hereby granted use the Leased Area nor permit the use thereof except for the purposes specified". *Id.*, p. 20.

The preamble of the Agreement of March 27, 1941, incorporated in each Lease by reference, stresses the same fundamental approach of the two Governments. *Id.*, p. 1. When the detailed terms and conditions of the Agreement are read as they must be in the light of the declared purpose, each provision is entirely consistent with the limited military character of the rights acquired by the United States, and numerous provisions are inconsistent with and negate a grant of any other or broader character:

General authority. The United States is given "all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control"; and similar authority is granted within the limits of territorial waters and air spaces adjacent to or in the vicinity of the Leased Area. *Id.*, p. 1, Art. I. When the United States is at war, it may also exercise in the surrounding areas of the entire British Crown Colony, waters and air spaces all rights, power and authority necessary for conducting "any military operations deemed desirable by the United States". Art. II. These grants of general authority, though broad, are necessarily limited to the defense and military objectives of the arrangements. This is underscored by succeeding articles of the Agreement. For example:

Postal facilities may be established by the United States for the "exclusive use" of its forces or personnel, "for domestic use" between the Leased Area and the United States, the Panama Canal Zone and the Philippine Islands. *Id.*, p. 8, Art. XVI. An annex to the Agreement emphasized that the postal facilities must be "strictly limited to persons entitled under Article XVI to use them", and that any mail by unauthorized persons must be turned over to the Crown Colony authorities, for examination and censorship. *Id.*, pp. 41-42.

Business enterprises (except post exchanges), may not be established in the Leased Area, and no person may "habitually render any professional services" therein except to or for the Government of the United States or the American forces or personnel therein. *Id.*, p. 9, Art. XVIII.

Immigration laws of the Crown Colony are suspended only to admit American military forces or personnel in connection with the construction, maintenance, operation or defense of the Base, but the United States is responsible for providing passage out of the Crown Colony for any such person no longer entitled to admission. *Id.*, p. 7, Art. XIII.

Customs and other duties are lifted only for limited purposes and personnel, and the re-sale of goods so admitted is prohibited except through post exchanges to authorized persons. *Id.*, pp. 7-8, Art. XIV. In a subsequent understanding embodied in an exchange of notes effective February 21, 1946, the United States agreed to certain procedures regarding prevention of re-sale of goods admitted free of duty, and undertook to ensure that free importation be "strictly limited" to goods covered by the 1941 Agreement and subsequent correspondence. *Treaties and other Interna-*

tion Acts Series 1592, *Department of State* (1947).

Wireless stations may not be established or submarine cable landed, except with the consent of the Crown Colony. *Executive Agreement Series 235* (1942), p. 8, Art. XV.

Commercial aircraft may not operate from the Base, except for strictly military purposes. *Id.*, p. 6, Art. XI(5). By subsequent agreement between the United States and His Majesty's Government in the United Kingdom, dated February 24, 1948, Kindley Field, Bermuda, among other bases, was opened to commercial aviation under stipulated terms and conditions. *Treaties and other International Acts Series 1717, Department of State* (1948).

Minerals and antiquities are not included in the rights and privileges granted; and the United States agrees to permit the exercise of fishing privileges within the Leased Area "insofar as may be found compatible with military requirements". *Executive Agreement Series 235* (1942), p. 11, Art. XXV.

Jurisdiction vested in the United States is limited to offenses of a military nature or related to protecting the security and property of the Base. *Id.*, p. 3, Art. IV. Jurisdiction may also be exercised under military law. *Id.*

Laws of the Crown Colony are inoperative in the Leased Area only to the extent that they "derogate from or prejudice any of the rights conferred on the United States by the Lease, or by this Agreement". *Id.* p. 12, Art. XXIX. All such local laws thus remain in effect except as they are inconsistent with American rights under the arrangements, either granted in terms or validly exercised pursuant to Article I. For example, as to workmen's compensation rights and remedies, see *infra*, p. 38.

Modification of the Agreement may be made by consent after a reasonable time. *Id.*, p. 12, Art. XXVIII. The United States is not obliged to exercise any right, power or authority granted or to maintain forces in the Leased Area (*id.*, pp. 2-3, Art. III), but agrees not to "assign or underlet or part with the possession of the whole or any part of any Leased Area". *Id.*, p. 10, Art. XXIII. The United States may abandon any Leased Area or part thereof without obligation; and, on the expiration of due notice, the area abandoned "shall revert to the Lessor". *Id.*, p. 10, Art. XXI.

These limited powers granted the United States in the Leased Areas, and the limited status therein of the United States, fall far short of the powers and status enjoyed in areas known as "possessions of the United States", such as Guam, American Samoa, or the Virgin Islands. The bases here in question are merely military outposts on foreign soil, leased to the United States only for security and defense purposes for a limited period of time. No more was sought. No more should be held to have been granted or acquired. As stated in *Oppenheim's International Law* (6th ed. by Lauterpacht), the leases "did not involve, apart from a rigidly limited concession of certain jurisdictional rights, any surrender either of sovereignty or of the exercise thereof" (pp. 413-414).

The court below (R. 67-68) in considering the powers granted to the United States failed to take account of the general and the specific limitations of the arrangements which give them their character.[7] The combi-

[7] The court particularly misconceived the purpose of Article XI of the Agreement, whereby "it is understood that a Leased Area is not a part of the territory of the United States for the purpose of

nation of the general over-all limitations to the military purpose with the specific limitations respecting all matters not directly related to that purpose yet incidental to it, serves graphically to emphasize the special military character of the arrangements and to exclude any implication that a "Territory" or "possession" was being transferred by His Majesty's Government or acquired by the United States.

3. *Subsequent executive interpretation*

All Executive agencies of the United States which have any jurisdiction in the premises have repudiated respondents' interpretation of the arrangements as granting powers tantamount to the creation of a "Territory or possession" of the United States within the meaning and coverage of the Fair Labor Standards Act or any other statute of the United States.

(i) *Department of State.* In a letter annexed to the Memorandum filed by the Solicitor General on behalf of the United States, in support of the petition for certiorari herein, the Department of State exhaustively

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coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." *Id.*, p. 6, Art. XI (4). The other provisions already cited show that the United States was not free to deal with the Leased Area as if it were a Territory or possession of the United States. *Supra, pp. 25-27.* The specific exemption as to coastwise shipping laws was obviously phrased to negative the words of the statute which the parties themselves deemed inapplicable in any event. It evidences the natural desire of a great maritime nation to avoid any question that the authority granted the United States might be deemed to exclude British vessels from trade between the United States and the Leased Areas. No more meaning can properly be read into the specific exemption of coastwise shipping laws. In any event, the Area cannot be said to be a "possession" because the Agreement makes it clear that it is not "territory" of the United States.

analyzed the provisions of the Agreement and concluded:

> "Under Art. IV (1) the United States does not have 'the absolute right' of jurisdiction over the offenses enumerated therein but only the absolute right 'in the first instance' to assume and exercise jurisdiction with respect to such offenses. The jurisdiction over offenses conferred on the United States by Art. IV is a limited jurisdiction, and is not confined to the leased areas but in some aspects extends also to the whole Territory in which the base is situated. . .
>
> "The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States. . . .
>
> " . . . The leased areas are to be held by the United States for the stated period for certain specified uses of a military nature, and the United States is not free to use them as if would its own property."

The Department of State "regards as unfortunate" the conclusion of the court below that the authority granted in the Leased Areas represents as complete control therein as in other areas long known as "possessions" of the United States:

> "The restrictions placed on use of the bases by the United States and the term of the lease are inconsistent with the conception of 'possessions' of the United States as applied to the areas mentioned in the Court's opinion."

On this understanding and interpretation, the Department of State did not include the Leased Areas when it submitted information on the "non-self-governing territories" under the administration of the United States to the Secretary General of the United Nations under Article 73(e) of the Charter, *Supra*, p. 15, n. 3.

Although the construction of domestic statutes and international agreements of the United States, like the construction of the Constitution itself, ultimately rests with this Court in cases or controversies appropriate to its jurisdiction, the foregoing interpretation of American authority over Leased Areas by the Department of State amounts to a *denial* of powers of sovereignty therein and is therefore entitled to the greatest weight, see *Pearcy* v. *Stranahan*, 205 U. S. 257, 272-274, on a par with the assertion by the executive of American sovereignty over other areas in the world. See *Jones* v. *United States*, 137 U. S. 202, 212. This Court has repeatedly ruled that "who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts". *United States* v. *Belmont*, 301 U. S. 324, 328; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Jones* v. *United States*, 137 U. S. 202, 212. See also, as to construction of international agreements or treaties, *Cameron Septic Tank Co.* v. *Knoxville*, 227 U. S. 39, 43; *Terrace* v. *Thompson*, 263 U. S. 197, 223-224; *Clark* v. *Deckenbach*, 274 U. S. 392, 395-396; *Jordan* v. *Tashiro*, 278 U. S. 123, 127; 5 *Hackworth, Digest of International Law*, pp. 259-260.

(ii) *Department of the Interior.* The Division of Territories and Island Possessions of the Department of the Interior has not been vested with administration of the Leased Areas, 5 U.S.C. § 433t, note, Reorg.

plan II, § 4(d); nor has the President vested such administration in any other Department as in the case of particular "Territories" or "possessions".

(iii) *The Wage-Hour Division, Department of Labor*, charged with the administration and enforcement of the Fair Labor Standards Act itself, has published interpretations which have been outstanding continuously from the inception of the Act to the present date. These interpretations have never included the Leased Areas or similar bases in the enumeration of "Territories and possessions" covered by the Act. Interpretative Bulletin No. 2, issued October 17, 1938, before the acquisition of the bases, reads as follows:

"Application of Act—Territories and Possessions"

> "In Section 3(c) 'State' is defined as meaning 'any State of the United States, or the District of Columbia, or any Territory or possession of the United States'. Therefore, employees within the District of Columbia, and the Territories and possessions (*Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands*), are dealt with on the same basis as employees working in any of the forty-eight States". 3 *CCH Labor Law Reporter* (4th ed.) par. 24, 476, [Italics supplied.]

This interpretation has remained outstanding to the present day. *Id.*, par. 24,102.01. Although fully cognizant of the instant case and other litigation raising the question, the Administrator reiterated this identical interpretative language as recently as July 3, 1947, more than six years after the Leased Areas were negotiated, in a "General Statement on Coverage". *Id.*, 12 F. R. 4583, 4584, § 776.1(c). The Administrator

has not joined in or supported the respondents' contentions herein, but on the contrary the Solicitor General has filed a memorandum in support of the petition for certiorari, urging that the judgment below is erroneous and should be reversed.

Notwithstanding the great amount of construction work already performed by the Government at these naval and air bases, the Fair Labor Standards Act has not been administratively applied to them; and the work done has been carried forward on an assumption that the Act did not apply. This interpretation by the Administrator is entitled to great weight. See *United States* v. *American Trucking Association*, 310 U. S. 534, 549. "The Administrator's policies . . . determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons". *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. Here, no reasons for variance appear, and considerations of national and international policy call for uniformity as between private rights and public enforcement.

4. Subsequent history of the arrangements

In 1944, a subcommittee of the House Committee on Naval Affairs suggested that the United States open negotiations looking to the permanent acquisition of the Leased Areas. *New York Times* (April 21, 1944) p. 8. Publication of this statement brought immediate reaction in Parliament. In reply to questions, Prime Minister Churchill assured the House that "there have

been no developments calling for a review by the Government or the House of the existing position in this matter, which remains unchanged". The following colloquy then ensued:

> "*Mr. G. Straus*: As the provisions of the Atlantic Charter provide that there should be no annexation without the consent of the population, do not the same provisions apply to British Dominion territories as well?
>
> *The Prime Minister*: There is not the slightest question of any cession of British territory—not the slightest". 399 *Parliamentary Debates, House of Commons* (April 26, 1944) p. 767.

The present position of the Department of State, as stated to this Court, does not depart in any respect from the understanding and objectives of the United States Government since 1940—that no more was acquired or is sought than a 99-year leasehold under and pursuant to the terms of the Agreement between the two Governments. The Agreement has been modified to grant landing rights for commercial aviation, but only by mutual consent according to its terms. *Supra*, p. 26. Otherwise the two Governments have been circumspect to adhere to its limitations, as in the case of suggested abuse of customs privileges by American personnel. *Supra*, p. 25.

5. *Congressional intent indicated by Section 17 of the Fair Labor Standards Act*

Our position is confirmed by internal evidence in the Fair Labor Standards Act itself. Section 17 vests jurisdiction to issue injunctions thereunder in

the District courts of the United States, and in "the United States courts of the Territories and possessions". But no civil courts of any kind have been established by Congress in the Leased Areas (R. 25), and the President has stated that "civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States". S. Rep. 26, Committee on Naval Affairs, U. S. Senate, 78th Cong., 1st Sess. For this reason, legislation was enacted extending the jurisdiction of naval courts-martial to civilian employees of Government contractors on leased areas "without the territorial jurisdiction" of the United States and under the control of the Secretary of the Navy. *Infra* p. 40. In reporting a similar measure in the preceding Congress, Chairman Walsh of the Senate Committee on Naval Affairs stated that it "seeks to give jurisdiction to naval courts over civilians employed by our naval organization in areas where no civil courts are available". 88 Cong. Rec. 9481; see also S. Rep. 1811, 77th Cong. 2d Sess., p. 2.

In contrast to this policy as to leased defense bases, the jurisdiction of the United States District Court for the Territory of Hawaii was extended by the Act of August 13, 1940, to Midway, Wake, and other enumerated South Sea island possessions of the United States, because of the prospective increase in defense activities thereon. 54 Stat. 784; see S. Rep. 536, Committee on the Judiciary, U. S. Senate, 76th Cong. 1st Sess.

In view of the total absence of United States courts in the Leased Areas with jurisdiction to grant injunctive relief or otherwise, the bases cannot be com-

prehended or included in the concept of "Territory" or "possession" as used in Section 17 or Section 3(c) of the Act.[8]

C. IN EVERY INSTANCE WHERE LEGISLATIVE COVERAGE OF THE LEASED AREAS WAS INTENDED, CONGRESS HAS EXPRESSLY INCLUDED SUCH AREAS, IN ADDITION TO EXPRESS COVERAGE OF THE "TERRITORIES" AND "POSSESSIONS" OF THE UNITED STATES.

The Fair Labor Standards Act became law in 1938. The naval and air bases were not leased from the British Government until 1940-1941. The question is not whether Congress has the power to extend the coverage of the Act to the Leased Area for the duration of the Lease under the powers granted by the instru-

[8] Even if a court with jurisdiction to grant injunctive relief were ultimately established in the Leased Area under Article I of the Agreement, such action would not constitute the Leased Area a United States "possession," any more than the existence of the United States Court for China, under extra-territoriality treaty since abandoned (57 Stat. 767), thereby established American "possessions" in the "treaty areas" of that country. Powers of extradition, for example, are exercised by courts of the United States in countries where extra-territorial jurisdiction exists, apart from and in addition to courts in areas known as Territories or possessions of the United States. See 48 Stat. 454, 18 U. S. C. § 662b; 78 Cong. Rec. 4982-4983. See also the Act of April 29, 1948, Public Law 505, 80th Cong. 2d Sess., extending jurisdiction of the United States District Court, Territory of Hawaii, to Canton and Enderbury Islands, which provides that such extension "shall in no way be construed to be prejudicial to the claims of the United Kingdom to said islands in accordance with the agreement" of April 6, 1939 (53 Stat. 2219), providing for their joint administration. See H. Rep. 1701, 80th Cong., 2d Sess.

Establishment of a United States court in a Leased Area would presumably be based on the powers granted by the Agreement rather than on a general reservoir of sovereign authority, as over a "possession" of the United States.

ments involved; but whether the Act as enacted and as it now stands should be construed as applicable to that Area and to others indistinguishable from it. The question is not whether the United States under Article I of the Agreement has the authority, granted thereby in 1941, to extend wage-hour standards to some or all employment on some or all Leased Areas, but whether the Fair Labor Standards Act, written several years before the Lease was signed, is fully applicable to all such Areas—and this notwithstanding that in the seven years which have elapsed since Congress acquired whatever authority it has over the Leased Areas, Congress has not so extended that Act after ample opportunity to consider the varying factors incident to the Areas from an employment and international standpoint.

The considerations that entered into the drafting of the Agreement have already been described. *Supra*, pp. 22-23. As to the applicability of the mass of laws of the United States and of the British colonies not specifically mentioned in the Agreement, the intent of the draftsmen was expressed by the civilian member of the United States Commission, as follows:

> "With respect to laws in general, we did not feel, and I think properly so . . ., that we should attempt to make for Congress a code of laws applicable to the territory. It was not practicable; it would have meant a long drawn out and distressing negotiation which would probably still be going on in London, without any agreement ever having been reached, if we attempted to go through all the laws of each of the separate territories and substitute ourselves for the Congress of the United States and determine in detail what

code of laws should be applicable to the territories about everything that might arise in the next 99 years. . . .

". . . the method of handling the problem of what specific additional regulations should be made was left, under the general grant of authority made by the agreement, to the United States, with a provision which would protect us from interference with our rights in the proper operation of the Bases, by the provisions of Article XXIX, from any law of the territory which would derogate from or prejudice any of the rights conferred on the United States." *Hearings on H. R.* 5096, Committee on the Judiciary, House of Representatives, 77th Cong., 1st Sess. (July 24, 1941), Tr. pp. 27-28.

Thus, apart from the matters specifically covered in the Agreement and Lease, the arrangements for the Leased Areas left to further and future Congressional determination, in each individual instance, as to whether particular statutory controls and regulations should be extended to the Areas, and whether they were within the authority granted.

This approach was squarely embraced by Congress.

1. *Workmen's compensation*

The original Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, covered disability or death resulting from an injury "occurring upon the navigable waters of the United States". 44 Stat. 1424, 33 U. S. C. § 903. The term "United States" was defined to mean "the several States and Territories and the District of Columbia, including the Territorial waters thereof". 44 Stat. 1424, 33

U. S. C. § 902. Because of difficulties in the administration and settlement of personal injury claims by employees on the leased bases, amendatory legislation was introduced in 1941 (H. R. 5996, 77th Cong., 1st Sess.), at the request of Secretary of War Stimson. H. Rep. 1070, 77th Cong., 1st Sess., pp. 3-4. The House Committee on the Judiciary, which heard the testimony already mentioned, *supra* p. 36, quoted and relied on authority under Article I of the Agreement, and favorably reported the measure "in order to effectuate the policy of building, maintaining, and operating military, air, and naval bases acquired by the United States for the protection of this country". *Id.*, p. 7. The Report stressed the undesirable situation of "lack of uniformity and absence of adequate protection under local laws". *Id.*, pp. 4-5.[9]

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[9] The measure, known as the Defense Base Act, approved August 16, 1941, 55 Stat. 622, was amended by 56 Stat. 1028, 1035 (1942), to apply to the injury or death of any employee engaged in any employment—

"(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

"(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

"(3) upon any public work in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone) . . .; or

"(4) under a contract entered into with the United States . . . to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work . . ." 42 U. S. C. § 1651.

Congress thus utilized its authority under Article I of the Agreement to extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to employment on the Leased Areas, and did so in a context plainly excluding such bases from the concept of "Territory or possession outside the continental United States."

2. *War Damage Corporation*

The Reconstruction Finance Corporation created a war insurance corporation on December 13, 1941, protecting property in the continental United States against damage from enemy attack. 88 Cong. Rec. 965. Coverage was extended on December 22, 1941, to property in Alaska, Hawaii, the Philippine Islands, Puerto Rico, and the Virgin Islands. 88 Cong. Rec. 965. Thereafter, bills to confirm this action were introduced, providing that insurance protection be "limited to property situated in the United States, including the several States, the District of Columbia, Alaska, Hawaii, Puerto Rico, and the Virgin and Philippine Islands". H. R. 6382 and S. 2198, 77th Cong., 2d Sess. The Senate Committee on Banking and Currency (S. Rep. 1012, 77th Cong. 2d Sess.) substituted substantially the language in the public law, which covers property "situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States" (56 Stat. 176).[19] Congressional comment makes clear that the

[19] The all-embracing language of the Committee amendment went beyond the suggestion of Senator Clark, a Committee member, to add the "Canal Zone and other United States possessions." Hear-

added phrase "in such other places" etc., embraced Army and Navy bases, occupied areas and the like,[11] in addition to and apart from the coverage of the "Territories and possessions" of the United States. The War Damage Act has not in fact been extended by Presidential action to the Leased Areas or any other American bases abroad. Its coverage has thus remained limited to the continental United States and the Territories and possessions.

3. Navy court-martial jurisdiction

The Act of March 22, 1943 extended the jurisdiction of naval courts-martial, in time of war or national emergency, to civilians serving with the Navy "within

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ings on S. 2198, Committee on Banking and Currency, 77th Cong., 2d Sess., p. 74. Senator Clark had in mind the particular bases of Pan-American Airways in the Canal Zone and on "islands which belong to us"; namely Wake Island, Midway Island, Guam and Canton. *Id.*, p. 10.

[11] "Of course, the word 'dominion' is a very, very elusive term. If, for example, we take over Asia Minor as part of the war control, that is under our dominion" (Senator Danaher, member of the Senate Committee on Banking and Currency, in *Hearings on S. 2198*, U. S. Senate, 77th Cong., 2d Sess., p. 104).

"This covers a great deal of territory, not only in the United States and possessions but in any territory we may secure control of anywhere, where we are putting our bases at the present time where we do not own them". (Congressman Gifford, member of the House Committee on Banking and Currency, in *Hearings on H. R. 6382 and S. 2198*, House of Representatives, 77th Cong., 2d Sess., p. 27).

"As I recall—and I can be corrected by my colleagues if I do not state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States, wherein there may be private property connected with them" (Congressman Dewey, member of the House Committee on Banking and Currency, in House Debate. 88 Cong. Rec. 1851).

an area leased by the United States which is without the territorial jurisdiction thereof".[12] The Report by the Senate Committee on Naval Affairs pointed out that comparable jurisdiction existed for civilians accompanying the Army in the field,[13] and that the President had stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States. S. Rep. 26, 78th Cong., 1st Sess., p. 1.

Extension of such military jurisdiction is plainly

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[12] "In addition to the persons now subject to the Articles for the Government of the Navy, all persons, other than persons in military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, shall, in time of war or national emergency, be subject to the Articles for the Government of the Navy except insofar as these articles define offenses of such a nature that they can be committed only by naval personnel: *Provided*, That the jurisdiction herein conferred shall not extend to Alaska, the Canal Zone, the Hawaiian Islands, Puerto Rico, or the Virgin Islands, except the islands of Palmyra, Midway, Johnston, and that part of the Aleutian Islands west of longitude one hundred and seventy-two degrees west." 57 Stat. 41, 34 U. S. C. § 1201.

[13] The Articles of War governing the Armies of the United States apply to "all retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles." 41 Stat. 787, 10 U. S. C. §1473 (d).

within the authority vested in the United States under Article IV of the Agreement.

4. Conclusion

The foregoing statutes form a pattern of Congressional interpretation that is entitled to the greatest weight in statutory construction. In each instance the legislative history or statutory text showed a clear intent to cover the Leased Areas; and in each instance, they were covered in terms clearly excluding them from denomination or consideration as "Territories" or "possessions" of the United States. This Congressional background is particularly significant since no Congressional acquiescence was obtained or sought on the basis that sovereignty or the authority of a sovereign power was being acquired over the Leased Areas. All official acts in the premises, executive as well as legislative, show that the United States contemplated and acquired only leaseholds for naval and air bases in British possessions, with the rights, powers and authority incident to their military purpose and within the terms of the Agreement.

D. CONGRESSIONAL AUTHORITY OVER THE LEASED AREAS ARISES FROM THE INTERNATIONAL AGREEMENT NEGOTIATED SUBSEQUENT TO ENACTMENT OF THE FAIR LABOR STANDARDS ACT, AND THAT ACT MAY NOT BE CONSTRUED TO COVER AREAS NOT EMBRACED IN THE SOVEREIGN LEGISLATIVE POWER THEN EXERCISED, PARTICULARLY SINCE THAT ACT DID NOT EVEN EXHAUST THE AUTHORITY THEN VESTED IN CONGRESS.

The limitations on American authority in the Leased Areas, already described (*supra* pp. 25-27), are not self-imposed by the United States. They are part of the very international arrangements under which the United States obtained whatever powers it does have in the Leased Areas. Those powers come from the

Agreement and Lease and can be exercised only thereunder and subject to the limitations imposed thereby. This is a far cry from the exercise of sovereign power over a possession or Territory, which belongs to the United States. Accordingly, the extension by Congress to the Leased Areas of any particular legislation must necessarily involve determination by Congress both of its authority under the international arrangements to make such extension and the policy considerations pertinent to such extension, as in the case of the workmen's compensation statute already referred to. *Supra*, pp. 37-38. The "constitution", as it were, of the Leased Area, is comprised of the Exchange of Notes, the Agreement and the Lease. Legislation must be enacted in the light of such "constitution" and any other factors appropriate for Congressional formulation of policy. This has not yet been done with respect to wage-hour standards.

In enacting the Fair Labor Standards Act, Congress was exercising its legislative power over the sovereign domain of the United States, not the more limited power residing in the United States by virtue of a particular international agreement. The power of the United States over the Leased Areas does not arise from sovereignty over them but from the terms of the international arrangements. The power thus far exercised by Congress in the Fair Labor Standards Act may not properly be construed as covering areas not embraced within the sovereign power exercised, nor can a contrary intention be imputed to Congress. This is particularly true where, as here, the statute did not even exhaust the Federal authority then vested in Congress, either over interstate commerce or the Territories and possessions. *Infra*, p. 58. The court below therefore erred in giving weight here to the precedents applying Congressional acts of general applica-

tion to the Territories or possessions though passed prior to the acquisition of the dependency there involved (R. 70).

The Fair Labor Standards Act of 1938 may not be construed to cover employment at the bases in Newfoundland, Bermuda, St. Lucia, Antigua, Jamaica, Trinidad and British Guiana. Congress was not acting in 1938 as a legislative body for those Areas. Should it determine to do so with respect to wage-hour standards, it would want to consider such questions as whether such legislation, if enacted for these places, should apply only to American employees or to employees indigenous to the place; and whether such legislation should apply to all or only to some of the Leased Areas. In determining these questions Congress would want to consider the prevailing wage rate, standard and cost of living, the effect on the British Colony as a whole of new wage-hour legislation for the Leased Area alone, and perhaps other questions of international relations or national defense.

We submit that the Leased Areas are not within the coverage of the Fair Labor Standards Act, and that they will not be covered unless and until Congress expressly so provides.

E. ANY DOUBTS SHOULD BE RESOLVED AGAINST CONSTRUING THE LEASED AREA AS A "TERRITORY OR POSSESSION" OF THE UNITED STATES.

In using the phrase "Territory or possession of the United States", Congress did not give it by definition or enumeration a meaning restricted to the purposes of this particular Act.[14] A holding that the Leased

[14] But cf. certain statutes regarding the Panama Canal Zone, set forth in *Luckenbach Steamship Co.* v. *United States*, 280 U. S. 173.

Area is a "Territory or possession of the United States" would bring into operation therein other statutes and powers of, and impose responsibilities upon the United States which Congress has not extended to nor intended to assume in these areas; e.g., as to citizenship or nationality of the inhabitants and of children born therein (Nationality Act of 1940, §§ 201, 202, 204, 54 Stat. 1138, 8 U. S. C. §§ 601, 602, 604); tariff duties (46 Stat. 590, 708, 19 U. S. C. §§ 1001, 1401 (k); mails and postage (45 Stat. 940, 1175, 39 U. S. C. §§ 283, 654); internal revenue (53 Stat. 79-81, 26 U. S. C. §§ 251, 252); passport issuance (44 Stat. 887, 22 U. S. C. § 211 (a)); and public health services (58 Stat. 683, 42 U. S. C. § 201 (g)), among other statutes of the United States. The implications of such a holding may not be limited to the confines of a particular statute, but bring to the bases all that the concept of a "Territory or possession of the United States" means under our Constitution and statutes and under the law of nations.

1. Other overseas bases of varying tenure, having conditions of use, occupation and control similar to the Leased Areas

The question has already arisen regarding the status and consequent coverage under the Fair Labor Standards Act of employees on military outposts in Greenland, Iran, Brazil and Canada (R. 72). Most courts passing on the issue concur in petitioners' view that such military bases are not covered by the Act. *Bernhard* v. *Metcalf Construction Co.*, 64 F. Supp. 953 (D. Neb.); *Burns* v. *Metcalf*, 69 F. Supp. 381 (W. D. Mo.); *Filardo* v. *Foley Bros.*, 181 Misc. 136 (Sup. Ct. N. Y.); *Greenstein* v. *Pan American Airways*, 185 Misc. 429 (Sup. Ct. N. Y.).

Examination of the conditions of use, occupation and control exercised by the United States in a number of these overseas bases discloses arrangements similar in many respects to those in the Leased Areas here involved. And in all such instances, as in the Leased Areas, sovereignty and the comprehensive powers of sovereignty are retained by the nation making available part of its territorial domain for purposes of American or international defense.

Among such overseas bases are the following:

(i) *Greenland.* By Agreement with Denmark dated April 9, 1941, the United States was authorized to construct, maintain and operate landing fields, seaplane facilities, radio and weather stations as may be necessary to prevent Greenland from being converted into a point of aggression against the Western Hemisphere. 2 *Hull, Memoirs* (1948) pp. 935-939; *Executive Agreement Series* 204, *Department of State* (1941), Arts. I and II. This includes the right to improve and deepen harbors, install aids to navigation by air and water, build roads, fortifications and other facilities, and to do "any and all things necessary to insure the efficient operation, maintenance and protection of such defense facilities as may be established." *Id.*, p. 3, Art. III. The United States may lease for the duration of the Agreement such areas of land and water as may be necessary for the construction, operation and protection of these defense facilities. *Id.*, p. 4, Art. V. The Kingdom of Denmark "retains sovereignty over the defense areas"; but for the duration of the Agreement, the United States has "exclusive jurisdiction" over such defense areas and military and civilian personnel of the United States and their families, as well as all other persons therein except Danish citizens and native Greenlanders. *Id.*, p. 6, Art. VI.

The United States may turn over to the Danish authorities in Greenland for trial and punishment, any person committing an offense in the defense area, "if the Government of the United States shall decide not to exercise jurisdiction in such case". *Id.* The United States may establish and maintain postal facilities and commissary stores to be used solely by military and civilian personnel of the United States and their families maintained in Greenland in connection with the defense establishment therein. *Id.*, p. 6, Art. VII. All materials, supplies and equipment for the construction, use and operation of the defense establishment and personal needs of military and civilian personnel of the United States and their families shall be permitted entry free of customs duties or other charges, and the American personnel are also exempt from all forms of taxes and levies. *Id.*, p. 6, Art. VIII. The United States "will respect all legitimate interests in Greenland as well as all the laws, regulations and customs pertaining to the native population and the internal administration of Greenland". *Id.*, p. 6, Art. IX. The Agreement shall remain in force "until it is agreed that the present dangers to the peace and security of the American continent have passed", at which time the modification or termination of the Agreement will be the subject of consultation between the two governments. Following such consultation, either party may terminate the Agreement on one year's notice. *Id.*, p. 7, Art. X. This Agreement is still in force.

(ii) *Guantanamo Naval Station.* The Act of March 2, 1901, providing for the recognition of Cuba, laid down among other conditions, "that to enable the United States to maintain the independence of Cuba, and to

protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States". 31 Stat. 895, 898. The principle was declared in the Constitution of Cuba, and in a treaty with the United States, 33 Stat. 2248, 2252. A *lease* "subject to terms to be agreed upon by the two governments", was concluded on February 16/23, 1903, providing that Cuba "hereby leases to the United States, for the time required for the purposes of coaling and naval stations", certain described areas of land and water. This includes the right to use and occupy adjacent waters, to improve the channel and anchorages, and "generally to do any and all things necessary to fit the premises *for use as coaling or naval stations only, and for no other purpose*". "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . ." 1 *Malloy, Treaties* (1910) pp. 358-359.

An Agreement between the two governments, dated July 2, 1903, declared their intention thereby "to conclude the conditions of the lease". *Id.*, pp. 360-361. The United States is to pay Cuba $2000 per year "as long as the former shall occupy and use said areas". Art. I. Cuba agreed to acquire title to all private lands in the area, with funds advanced by the United States and credited to the annual payments. *Id.* "No

person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise" in the areas. Art. III. The parties agreed to the delivery to each other of fugitives from justice charged with crimes amenable to Cuban or American law respectively who have taken refuge in their respective areas. Art. IV. No customs duties are to be levied on materials of any kind imported into the areas "for exclusive use and consumption therein". No such materials shall be transported from the areas "into Cuban territory". Art. V.

Under the 1934 treaty with Cuba, in furtherance of "good relations upon the enduring foundation of sovereign equality", all remaining authorization to intervene in Cuban affairs was terminated. Exec. Q, 73d Cong. 2d Sess. The treaty also provided for continuation of the Guantanamo lease agreement "until the two contracting parties agree to the modification or abrogation" thereof. See 48 Stat. 1682, 1683; 1 *Hyde, International Law* (1945 ed.) p. 63, n. 3.[15]

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[15] In 35 Op. Atty. Gen. 536, Attorney General Sargent ruled that goods of foreign origin brought into the area were not subject to tariff duties levied under the Tariff Act of 1922 "upon all articles when imported from any foreign country into the United States or into any of its possessions . . ." 42 Stat. 858, 19 U. S. C. §121. The Attorney General stated that the area was "not a 'possession' of the United States," as the word is used in the tariff laws, but only a "place subject to the use, occupation and control of the United States for a particular purpose," in view of "the nature of the station, as a mere governmental outpost beyond our borders, without inhabitants other than as indicated, closed to ordinary commerce, and into which no person or thing may enter without permission." *Id.*, pp. 540-541; see also 3 Hackworth, *Digest of International Law*, p. 9; 4 *id.*, p. 22; Wilson, *Leased Territories* (1940) 34 Am. J. Int. Law, pp. 703-704. The scope of authority granted the United States in Guantanamo is obviously

(iii) *Other overseas bases.* During World War II, American military bases spanned the globe. The bases throughout the Western Hemisphere—in Canada, Mexico, Panama, Ecuador, Peru and Brazil—particularly hastened the victory of our arms in both Europe and Asia. See 2 *Hull, Memoirs* (1948) pp. 1422-1423. At the present time, in addition to the bases above described, pp. 46-49, American bases or air maintenance depots are known to be located in Canada, England, Iceland and the Azores, as well as in the Trust Territory of the Pacific and in certain enemy-occupied countries

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far narrower than in the Canal Zone; and the authority granted in the Bermuda Base and other Leased Areas is narrower still.

The Guantanamo Naval Station or Operating Base was not included among the non-self-governing areas under United States administration, reported to the United Nations in 1946, *supra*, p. 15, n. 3, nor in the enumeration by the Administrator of the Wage-Hour Division of areas deemed "possessions," for purposes of coverage under the Act, in 1938 and in 1947. *Supra*, p. 31. So far as we are advised, the only reference to the Guantanamo base in the context of "possessions" appears in the Defense Base Act where it is listed with enumerated areas such as Alaska and the Philippine Islands. Such enumeration is in effect a particular definition of the term and is obviously limited to the purposes of the particular statute, as in the case of the Canal Zone in this and other instances. *Supra*, p. 44, n. 14. Its inclusion at this point was undoubtedly an incident of drafting this particular amendatory provision, since "at the time the legislation was drafted it was contemplated that its provisions would be made applicable only to the island bases acquired from Great Britain; however, the War and Navy Departments have requested the extension to *the other lands and possessions* for the reasons stated." H. Rep. 1070, Committee on the Judiciary, 77th Cong., 1st Sess., p. 5. [Italics supplied.] Moreover, the Defense Base Act applies to the Bermuda Base and other Leased Areas acquired since January 1, 1940, in a context plainly excluding them from any intended enumeration of "possessions" of the United States, for purposes of that statute or otherwise. *Supra*, p. 38, n. 9.

or colonies.[16] Moreover, the Charter of the United Nations contemplates the establishment of military bases on the territory of member nations.[17]

The foregoing sufficiently shows the world-wide distribution of our bases and the possible variations in duration of our rights therein. Notwithstanding such differences in location and tenure, the problems arising from their use, occupation and control are surprisingly similar, as shown by comparing the detailed arrangements already described. Provisions regarding immigration, customs, jurisdiction over offenses, tax exemption, post-exchanges, and the like run through the agreements for military bases, whether negotiated with Denmark and Cuba, Portugal or Great Britain. Such provisions manifest problems incident to military utility rather than sovereign dominion. Their inclusion in these agreements represents the best possible accommodation of the military objective of the arrangements with the sovereignty retained by the nations which made the areas available. As the Department of State has advised this Court, such provisions have been

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[16] *Executive Agreement Series 232, Department of State* (1942), *Treaties and Other International Acts Series 1566, Department of State* (1947) (Iceland); 14 *Department of State Bulletin* (1946), pp. 1080-1082, *Department of State Release #118* (February 13, 1948 (Azores); *New York Times* (January 15, 1948), p. 1 (Libya); *Department of the Air Force, Release #18* (August 25, 1948) (United Kingdom).

[17] By Article 43, "all Members . . . in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, . . . *facilities, including rights of passage*, necessary for the purpose of maintaining international peace and security." Such agreements shall be "subject to ratification by the signatory states in accordance with their respective constitutional processes". (Italics supplied.) 59 Stat. 1033, 1043.

or are being made for members of the armed forces or other government personnel in many foreign countries "without any suggestion that by the grant of such rights and privileges the foreign sovereign concerned has surrendered its sovereignty or bargained away its possessions".

We submit that any doubt should be resolved against a holding that the Leased Areas are "possessions" of the United States, in view of the widespread and unanticipated consequences of such a novel holding, as to many similar arrangements indistinguishable in principle.

2. Prejudicial effect of a holding that Leased Areas are "possessions of the United States".

The importance of military bases beyond our shores, and the delicate character of such arrangements from a military and diplomatic standpoint, require no elaboration. Referring to the military bases granted by Latin American countries during World War II, Secretary of State Cordell Hull stated:

> "When it is recalled that for many decades a number of the Latin American Republics feared armed intervention by the United States, their willingness to welcome armed forces of this country within their borders assumes added significance". 2 *Hull, Memoirs* (1948) pp. 1422-1423.

Particularly as to such bases, repeated assurances were given during the war to controvert enemy propaganda that we sought permanent footholds on Latin-American soil.[18]

[18] See statements of the Acting Secretary and the Secretary of State, *New York Times* (March 7, 1943) p. 27; *New York Times* (June 13, 1944) p. 14. The Government of Panama, which had

In the memorandum filed herein by the Solicitor General on behalf of the United States as *amicus curiae*, the Department of State has emphasized the adverse implications of a ruling that the Leased Areas are now or may be construed to be "Territories" or "possessions" of the United States:

> "Any holding that the bases obtained from the Government of Great Britain on 99-year leases are 'possessions' of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought."

3. Conclusion

In all the circumstances, it is submitted that any doubt as to the construction of the statute should be resolved against its application to Leased Areas on foreign soil, with corresponding connotations of American sovereignty. Such application should be made only by Congress, in the light of the situation existing at the time Congress acts, and with the benefit of consultations with the executive departments particularly concerned with our international relations, insular affairs, national defense, and labor relations. It is sub-

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made available to our forces 134 different areas for military installations to protect the Panama Canal during World War II, declined to ratify an agreement negotiated in 1947 for five-year leases of 13 defense sites and a ten-year lease of the Rio Hato air base. *Department of State*, Press releases December 10, 1947, December 23, 1947, and February 20, 1948; 18 *Department of State Bulletin* (1948) p. 317.

mitted that the Judiciary should be slow to decide that laws enacted without consideration of those factors should be applied to the Leased Areas under the guise of "Territories or possessions" of the United States. Peculiarly in this case, "to blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation." See *Addison* v. *Holly Hills Fruit Products Co.*, 322 U. S. 607, 618.

II

The Leased Area in the British Crown Colony of Bermuda Is Not Otherwise Within the Coverage of the Fair Labor Standards Act

The petition for certiorari was addressed solely to the ground of decision of the court below; namely, that the Leased Area in Bermuda is a "possession" of the United States and consequently within the definition of "State" in Section 3(c) of the Fair Labor Standards Act. Respondents' opposition to the petition for certiorari, however, appears to abandon this position, and presents an entirely different argument which we assume will be pressed in this Court; namely, that the "controlling factor" in this case is not whether the Leased Area is a "possession" of the United States but whether it is a "place outside" any State within the meaning of Section 3(b), which defines the term "commerce" to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." (Resp. Br. Opp. p. 6.) Respondents argue that Congress intended the phrase "place outside" to refer simply to any place "where federal controls exist"; and they appear to contend that this case involves covered employment in "commerce" from any "State" in the continental

United States from which construction materials were shipped, to a "place outside thereof," i. e. to the Leased Area. *Id.*, p. 5. This argument is wholly without substance.

Respondents and the court below (R. 72) appear to concede that the Fair Labor Standards Act is not applicable generally in foreign lands. This construction, consistently applied since the inception of the Act,[19] accords with the usual construction that even as to American citizens, "all legislation is *prima facie* territorial," *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, 357, and that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States," *Blackmer* v. *United States*, 284 U. S. 421, 437, particularly where, as here, criminal penalties are involved. See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318; *United States* v. *Flores*, 289 U. S. 137, 155.

There can be no question that the Act covers employees who are engaged "in" or in the "production of goods for" commerce "from any State" (in the continental United States or any outlying Territory or

[19] The administrative interpretation is stated by the Administrator of the Wage and Hour Division in "*Official Answers to Questions*": "You are advised that the Act does not apply to work and employees working in foreign countries even though such employees are citizens of the United States. It is also my opinion that time spent by such employees in traveling from a point within the United States to the foreign destination need not be considered work covered by the Act, assuming, of course, that the employees perform no work of any kind for their employer while engaged in such traveling." *Wage and Hour Manual* (Cum. ed., 1944-1945) p. 118.

possession) "to any place outside thereof," *anywhere* in the world. §§ 2(b), 3(c), 15(a). That is to say, the Act applies to a factory worker in New York producing goods for shipment, or to a longshoreman on the New York docks loading such goods for shipment, "to" a Leased Area, "to" Puerto Rico or "to" London, England. This is the normal and natural meaning of the phrase "place outside thereof," as used in this and other statutes; e. g., Public Utility Holding Company Act of 1935, § 2(a) (28), 49 Stat. 804, 15 U. S. C. § 79b(a)(28). The word "place" is the broadest possible term that could be used; it is broader, for example, than the terms "foreign country" or "foreign nation," used in the Federal Trade Commission Act, § 4, 38 Stat. 730, 15 U. S. C. § 44, and the National Labor Relations Act, as amended, § 2(6), 49 Stat. 449, 29 U. S. C. § 152(6).

Respondents' construction reads the words "place outside thereof" to embrace coverage of employees at the destination point outside the United States. This reading leads to the absurd result that the Act covers generally longshoremen unloading on the docks at London, England, goods shipped from the United States, or unloading at any other "place outside" the seaboard State from which the goods originated. Respondents withdraw from this construction to the extent of adding the qualification, "any place outside thereof where federal controls exist." This reads into the language of the statute words which Congress did not place there. *Cf. Hilton* v. *Sullivan*, 334 U. S. 323, 339; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617-618. Moreover, respondents' interpretation would mean that employment in a seaboard State on goods destined for shipment outside the continental United States would be covered or not depending on

whether the destination "place outside thereof" was under "federal control." Thus the Act would be misread to cover employees within a seaboard State producing or moving goods destined for a Leased Area but not for the British Isles.[20]

The Court is not here presented with the issue whether Congress has power to regulate the wages and hours of employees in the Leased Areas, or of American citizens [21] or foreign nationals working anywhere in the world, on public works of the United States or otherwise. Such issues of constitutional power do not arise since the statute purports to cover only employment of employees engaged in or producing goods for commerce among the several States (including the District of Columbia, and the Territories and possessions of the United States), or *from* any State to any place outside thereof.

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[20] The instant case does not involve coverage of employment related to goods shipped from a place abroad to the continental United States for consumption in the seaboard State of destination. It should be observed that unlike other statutes embracing commerce "*between*" any State and any place outside thereof, the Fair Labor Standards Act embraces only commerce "*from*" any State to any place outside thereof. The Act has been administratively construed not to cover the employees of American importers working in the State of importation, provided that the goods are consumed only within that State and do not thereafter cross the State line either in original package or otherwise. See "*Official Answers to Questions,*" issued by the Administrator of the Wage Hour Division, in *Wage and Hour Manual* (Cum. ed. 1944-1945) p. 116. Likewise, employees of importers handling goods in the United States which were produced in Mexico under substandard conditions, are not in violation of the "hot goods" section of the Act, §15(a)(1), since Mexico is not a "State" within the statutory definition of Section 3(c). *Id.*, p. 116.

[21] The record is devoid of allegation or proof that any of the respondents is an American citizen, although many doubtless are.

Our position against coverage of employment in the Leased Areas is reenforced by the fact that "in the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority." *McLeod v. Threlkeld*, 319 U. S. 491, 493. "In enacting this statute Congress did not see fit, as it did in other regulatory measures, e. g. the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce". *10 E. 40 St. Co. v. Callus*, 325 U. S. 578, 579; *Kirschbaum Co. v. Walling*, 316 U. S. 517, 521-523; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 569-571. See also *Morris v. McComb*, 332 U. S. 422; *Levinson v. Spector Motor Co.*, 330 U. S. 649; *Western Union Co. v. Lenroot*, 323 U. S. 490; *Higgins v. Cary Bros. Co.*, 317 U. S. 572. Nor does the Act exhaust the plenary power of Congress within enumerated places under United States sovereignty. Instead of embracing purely local commerce in the District of Columbia, and in the Territories and possessions of the United States, the Act covers employment in these places on the same basis as employment in the 48 States. See *Interpretative Bulletin No. 2*, quoted *supra*, p. 31. The Philippine Islands were excluded altogether because not expressly enumerated. 39 Stat. 547, 48 U. S. C. § 1003. Special provision has been made as to minimum wages and homework in the Virgin Islands and Puerto Rico. 54 Stat. 615, 616, 29 U. S. C. § 205(e), 206(5).

With the statute so restricted, respondents' attempted construction to cover Leased Areas around the world is wholly untenable.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the judgment of the court below should be reversed.

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September, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 608

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY INC. and THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,

Petitioners,

against—

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR. and DAVID JOSEPH TOWNSEND,

Respondents.

RESPONDENT'S BRIEF.

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INDEX.

Subject Matter.

	PAGE
Question Presented	2
Statement	2
No Compelling Reasons to Sustain Granting of Writ	4
Conclusion	7

Citations.

Cases:

Crowe v. Elmhurst Contracting Co., Sup. Ct., N. Y. L. J. April 17, 1947, page 1496	7
Eckert v. Elmhurst Contracting Co., 185 Misc. 100, 61 N. Y. S. (2d) 730	7
Ex Parte Cooper, 143 U. S. 472	6, 7
Walling v. Jacksonville Paper Co., 317 U. S. 564	2, 5

Statutes:

Leased Naval and Air Bases, Executive Agreement Series No. 235, 55 Stat. Pt. 2, 1560 et seq.	2
Portal to Portal Act of 1947, 29 U. S. C. A. Section 255	5
Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. Section 201 et seq.	3

Text Books:

Willoughby, The Constitutional Law of the United States (2d Ed.), Vol. 3, Section 855, page 1336	7

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Respondents.

RESPONDENT'S BRIEF.

For the reasons hereinafter stated it is respectfully submitted that petition for writ of certiorari to review the judgment entered by the United States Circuit Court of Appeals should be denied.

QUESTION PRESENTED.

It is submitted that the question as presented by petitioners is stated incorrectly. The issue is not whether the outlying base in Bermuda leased to the United States for 99 years by the British Government is a "territory or possession" of the United States "with the consequence" that the Fair Labor Standards Act (29 U. S. C. A. Sec. 201, *et seq.*) applies; but rather whether within the broad coverage of the Act ("to extend federal control" in the field of working conditions "throughout the farthest reaches of the channels of interstate and foreign commerce"—*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567), the area so leased (Executive Agreement Series No. 235, *Leased Naval and Air Bases*, 55 Stat. Pt. 2, 1560-1594) is a possession within the meaning of the Fair Labor Standards Act in a controversy "between private parties".

STATEMENT.

The United States Government leased from the British Government the outlying base area in Bermuda "to hold unto the United States for a term of ninety-nine years" with the "rights, powers and authority, and on the terms and conditions" stated in the contemporaneous agreement which "shall be regarded as incorporated in and made part of this lease" (55 St. Pt. 2, 1577; R. 90). The agreement does not specifically declare the leased areas to be part of the United States but the cumulative effect of its various provisions "compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas * * *" (Opinion below, R. 91).

A summary of the terms and conditions of the Executive Agreement and lease (55 Stat. Pt. 2, 1560-1594) is set out in the opinion of the Circuit Court (R. 90-92).

The United States Government contracted with the petitioners for the construction of a defense base in such leased area in Bermuda. The construction of this base was an undertaking of enormous proportions (R. 21). The respondents were hired as patrolmen and firemen to police, guard and protect the divers activities of the defendants on the Island of Bermuda (R. 66, 67): The respondents were required to, and did do a great deal more than protect original construction work, as stated by petitioners in their petition (p. 4). They were required to protect not only the construction work, but goods, merchandise, materials, equipment, tools, etc., which were loaded and unloaded on and from ships; stored on docks and elsewhere for reshipment; transferred on trucks from docks to the bases and from the bases to the docks; enormous amounts of supplies etc., recrated for shipment to other areas and return to the United States (R. 18, 22, 23, 35, 43, 48, 62, 66, 67).

The respondents sued under the provisions of the Federal Labor Standards Act of 1938 (R. 9-11) in the Supreme Court of New York, which action was transferred to the United States District Court for the Southern District of New York (R. 1). On motion of petitioners (R. 19) the District Court granted summary judgment dismissing the complaint on the ground that until the legislative and executive departments of our Government declare that such leased area is "within the sovereign jurisdiction of the United States" (R. 80) the Fair Labor Standards Act of 1938 does not apply.

On appeal the Circuit Court of Appeals reversed, holding that [1] the nature of the control over these areas, the scope of the grant, "is important for our purposes" (R. 90) and since "before us is a matter of interpretation of an Act in issue between two groups of private parties" (R. 92) the Court need not await a formal declaration by the legislative and executive departments of government in order to determine this private controversy (R. 93); and [2] after indicating the cumulative effect of the various provisions of the

lease and agreement (R. 91) which clearly grants to the United States the control of this area, the Court concluded:

> "* * * We are compelled to conclude that the intended coverage of the Act is sufficiently broad to include areas such as those here in question."

NO COMPELLING REASONS ARE STATED TO SUSTAIN GRANTING OF THE WRIT.

The Circuit Court in its opinion reviewed and carefully considered the reasons asserted by petitioners on this application. It is submitted that the Circuit Court made proper disposition of the contentions urged by the petitioners.

I.

The decision of the Circuit Court as already indicated, does not rest, as petitioners assert (p. 5), on the determination that these leased areas are "possessions of the United States." The facts are clearly distinguishable from the cases involving military bases in Greenland, Brazil, Iran and Canada.

> "* * * The facts in these cases indicate distinctions from those present here. There the problem was whether or not the Act would apply to persons working in foreign countries. Here there is a long lease entered into with our government which gives it sweeping powers in the area. Without such arrangements for control these other plaintiffs were shown only to be working in foreign countries to which the coverage of the Act has not been extended." (R. 92)

Respondents respectfully submit that the Circuit Court of Appeals did not hold that the naval and air base in Bermuda leased to the United States is a "possession" of the United States, as stated by petitioners (pp. 4-5); but held that within the broad intendment of the Fair Labor Standards Act of 1938, in a controversy between private parties, where the clear purpose of said Act is

> "'to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce,' *Walling* v. *Jacksonville Paper Co.*" (R. 92)

it covered

> "American workmen at Bermuda bases as fully as natives working in Samoa or Guam." (R. 92)

This holding, it is submitted, is therefore not erroneous.

II.

It is no ground for a review that the work was carried on upon the assumption by petitioners that the Act did not apply, or that public funds are involved; nor that other employees may have similar actions. (Portal to Portal Act of 1947, 29 U. S. C. A., Sec. 255, may have outlawed all such like actions.)

III.

Under the act, "commerce" means trade, etc., "among the several States or from any State to any place outside thereof." "To any place outside thereof," it is submitted, refers to any place where federal controls exist. Petitioners have at no time contended nor have they ever urged that the chan-

nels of commerce in the leased areas in Bermuda are beyond the control of the United States. This is the controlling factor in this case. It is not whether this area is a "possession of the United States" but rather is this area such a place where the federal government controls the flow of commerce? Nor is sovereignty a factor. The Court below properly decided this issue, in saying:

> "Defendants urge, and the district court agreed, that the question whether the areas are possessions is a political one, either already settled or to be settled only by executive or legislative determination. Undoubtedly courts should avoid the determination of political issues, but it is difficult to see how this is such an issue. Before us is a matter of interpretation of an Act in issue between two groups of private parties. Obviously this arises in consequence of political acts, and those conceivably might have been of such precise form or exact agreement with a foreign state as to settle the question. But here they were not, and we must determine this private controversy, even if it arises as to areas affected by an agreement between nations. *Ex parte Cooper*, 143 U. S. 472, with full discussion at 499-503. As a matter of fact the courts have not hesitated to determine the status of acquired territory for the purposes of a particular case and with reference to particular acts of Congress including those passed prior to such acquisition * * *."

IV.

The contentions urged by petitioners (pp. 13-15) that other governmental departments have taken a view on this issue which is in conflict with the holding in the Circuit Court was carefully considered by the Court below (R. 92 [note 1 and 2], 93-94 and notes). "But, notwithstanding defendants' contentions it seems clear they [governmental departments] have not" (R. 93). Even if we were to concede that the

Executive Departments had determined the issue, the Court, in determining personal and private rights, would be bound by the terms of the lease and agreement, even when, by doing so, it had to go counter to the position previously assumed by the Executive Department.

Willoughby, *The Constitutional Law of the United States*, (2d Ed.), Vol. 3, Section 855, page 1336;

Ex Parte Cooper, 143 U. S. 472, 499-503.

V.

In two New York cases squarely dealing with the question here presented, the courts held the Act applicable by virtue of the nature and scope of the leasehold agreement (R. 94-95)

Eckert v. *Elmhurst Contracting Co.*, 185 Misc. 108, 56 N. Y. S. (2d) 98, aff'd 186 Misc. 100, 61 N. Y. S. (2d) 730;

Crowe v. *Elmhurst Contracting Co.*, Sup. Court, N. Y. County, N. Y. L. J. April 17, 1947, page 1496.

CONCLUSION.

PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 22.

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., and the ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,

Petitioners,

—against—

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NIETER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

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INDEX.

PAGE

SUBJECT MATTER.

Question Presented 2

Facts 2

Statutes Involved 4

Pertinent Provisions of Lease and Agreement 5

Opinion of Circuit Court 7

Argument 9

Point I—The Fair Labor Standards Act is applicable to the Leased Areas, since United States has jurisdiction and control of commerce (and consequently of conditions of commerce) in said Areas. Therefore Congressional Legislation with respect to Commerce was authorized and effective within those Areas 9

A. Congress has Legislative Power over commerce in the Leased Areas 11

B. Fair Labor Standards Act applies even though enacted prior to acquisition of Leased Area 16

Point II—The Leased Area in Bermuda falls within the expression "Territory or possession" of the United States 21

Conclusion 28

PAGE

Cases Cited.

Bay Ridge Operating Co. v. Aaron, — U. S. —, 68 S. Ct. 1186 23
Carter v. Carter Coal Co., 298 U. S. 238 16
Cases v. United States, (C. C. A. 1st Cir.), 131 F. (2d) 916, Cert. Den. 319 U. S. 770 19
Crespo v. United States, (C. C. A. 1st Cir.), 151 F. (2d) 44, Cert. Den. 327 U. S. 758 19
Crowe v. Elmhurst Contracting Co., 74 N. Y. S. (2d) 445, aff'd — App. Div. —, 79 N. Y. S. (2d) 876 20
De Lima v. Bidewell, 182 U. S. 1 13
Ex parte Cooper, 143 U. S. 472 14
Eckert v. Elmhurst Contracting Co., 185 Misc. 108, aff'd — 186 Misc. 100 19
Filardo v. Foley Bros. Inc., 297 N. Y. 217 19
Hoover & Allison Co. v. Evatt, 324 U. S. 652 15
McComb v. Herlihy, (C. C. A. 4th Cir.), 161 F. (2d) 568 16
McLeod v. Threlkeld, 319 U. S. 491 12
Mormon Church v. United States, 136 U. S. 1 15
National Labor Relations Board v. Gonzales Padin Co., (C. C. A. 1st Cir.), 161 F. (2d) 353 19
Overstreet v. North Shore Corp., 318 U. S. 125 11
Ozawa v. United States, 260 U. S. 178 19
Puerto Rico v. Shell Co., 302 U. S. 253 ..... 17, 18, 20
Rasmussen v. United States, 197 U. S. 516 14
10 E. 40th St. Co. v. Callus, 325 U. S. 578 12
Tennessee Coal Co. v. Muscoda Local, 321 U. S. 564 .... 11, 17
United States v. Chicago M. Ry. Co., 149 Fed. 487 12
United States v. Darby, 312 U. S. 100 11
United States v. Gratiot, 14 Pet. 526 22
Walling v. Jacksonville Paper Co., 317 U. S. 564 ..... 11, 16
Walling v. Patten-Tulley Transp. Co., (C. C. A. 6th Cir.), 134 F. (2d) 945 11
Wilson v. Shaw, 204 U. S. 24 24

PAGE

Statutes, Etc.

Constitution:

Article IV, Sec. 3, Cl. 2 ..... 15, 22

Statutes:

52 Stat. 1060, 29 U. S. C. A. § 201, et al. 2, 4, 5, 11
§ 202 ..... 4, 9, 11, 17
§ 203b 5, 12
§ 203c 5, 12
§ 206 5
§ 207 5
§ 218 ..... 5, 21

53 Stat. 622 15

55 Stat. 1560-1599 ..... 2, 5, 6, 7, 25

56 Stat. 174 15

57 Stat. 41 15

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Aufricht, Hans, *On Relative Sovereignty*, 30 Cornell L. J. 137 27

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Handbook on International Law (1939) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 22.

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., and the ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS,

Petitioners,

—against—

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. MCDONALD, PAUL F. NIETER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

This is an action under the Fair Labor Standards Act of 1938 for overtime pay and damages due respondents from their employment by petitioners in the Area of the Island of Bermuda, leased by the United States from the British Government. The United States District Court for the Southern District of New York dismissed the complaint on petitioners' motion for summary judgment (R. 62-63) and

granted judgment to the petitioners. The judgment was reversed by the United States Court of Appeals for the Second Circuit (R. 73); and is before this Court on Writ of Certiorari granted on March 29, 1948 (R. 75).

QUESTION PRESENTED.

Whether the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. A. § 201, *et seq.*) applies to work performed by respondents in the Area of Bermuda leased to the United States by Agreement and Lease (55 Stat. 1560, *et seq.*) which work was done pursuant to contract made between the parties in the United States and is otherwise covered by the Act.

The respondents contend that, regardless of the nature of the sovereignty or the territorial or property interest acquired by the United States under that Agreement and Lease in that Area, the Fair Labor Standards Act is effective there and applicable to the work performed by respondents.

FACTS.

By agreement between the United States Government and the Government of Great Britain and Northern Ireland certain areas of the Island of Bermuda were leased to the United States (55 Stat. 1560 *et seq.*) "to hold unto the United States for a term of ninety-nine years" (55 Stat. 1577). The United States entered into a contract with the petitioners for the construction of Outlying Defense Bases on the Leased Area in Bermuda.

The building of these Defense Bases was an undertaking of enormous proportions. The affidavit of Robert Glenn, an employee of one of the petitioners (R. 13-15), indicates, in part, the magnitude of the work. The respondents were hired as patrolmen and firemen to police, guard and protect the divers activities of the petitioners in the Leased Areas (Affidavits in opposition to motion, R. 51-53).

Respondents were hired in New York City. Their contract of hire did not state the hours of employment; but each respondent at the time of hiring was given an instruction sheet which stated that the work-week would consist of 48 hours (R. 51). Once in Bermuda the respondents were required to work a 56-hour work-week, and overtime was paid to them at time and a half for each hour over 8 hours in any one day. Respondents claim that they were required to and did work at least 63 hours each week, and no claim is made for hours in excess thereof (R. 26, 41).

The scope and extent of the work of the respondents is set out in full in the affidavit of the respondent David Joseph Townsend (R. 51). In view of the enormity of the petitioners' undertaking, the respondents were required to patrol and protect, not only the construction work, but goods, merchandise, materials, equipment, tools, etc., which were loaded and unloaded on ships; stored on docks and elsewhere for reshipment; transferred on trucks from docks to the bases and from the bases to the docks; enormous amounts of supplies, as originally crated, and supplies and materials re-crated for shipment to other points or for return to the United States (R. 48, 49, 51-53). The duties of the respondents were to protect cargoes arriving and leaving, to protect materials and supplies destined for the construction work, to protect the goods and merchandise received and thereafter delivered to the stores and commissaries of the petitioners for re-sale to the local population (*ibid.*). The respondents' activities were directly concerned with transporting men, materials, merchandise and equipment to this Bermuda Area from the United States or other of the Leased Areas, and from this Bermuda Area to other bases and points, by reason of military secrecy, unknown to the respondents (*ibid.*).

On the way to Bermuda and on the return to the United States, some of the respondents, under the direction of the petitioners, patrolled and guarded merchandise and equipment of the petitioners on board ship (R. 20, 53).

STATUTES INVOLVED.

FAIR LABOR STANDARDS ACT OF 1938 (52 Stat. 1060, 29 U. S. C. A. § 201, *et al.*) was enacted for the purposes set forth in § 202 of the Act, as follows:

> **"§ 202. Congressional finding and declaration of policy.**
>
> "(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "(b) It is declared to be the policy of sections 201-219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

The Act is made applicable, with certain exceptions not here material, to any employee "who is engaged in commerce or in the production of goods for commerce" (29 U. S. C. A. §§ 206, 207).

Under the Act "Commerce" means

> "trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof." (29 U. S. C. A. § 203[b].)

"State" means

> "any State of the United States or the District of Columbia or any Territory or possession of the United States." (29 U. S. C. A. § 203[c].)

The Act provides for minimum wages (§ 206) and for maximum hours (§ 207) for employees so engaged and expressly provides that (§ 218):

> "No provision * * * of this title shall * * * justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable [under the Act]."

SUMMARY OF PERTINENT PROVISIONS OF LEASE AND AGREEMENT RELATIVE TO LEASED AREAS (55 STAT. 1560, ET SEQ.).

The Agreement between the contracting nations provides:

> "The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defense thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the Leased Areas, which are necessary to provide access to and defense of the Leased Areas, or appropriate for Control thereof." (Article I, 55 Stat. 1560.)

Significant of the comprehensive authority of the United States over "commerce" for the Leased Areas under the Agreement are the following provisions:

The Agreement expressly grants to the United States the right, power and authority (Article I(2), 55 Stat. 1561):

> "(a) to construct, maintain, operate, use, occupy and control the said bases;"
>
> "(d) to regulate and control within the Leased Areas all communications within, to and from the areas leased."

and the Agreement recognizes that the United States may "interfere with the necessary rights of navigation, aviation or communication to or from or within the Territories" * (Article I(3), 55 Stat. 1561).

In cases of crimes and offenses of a military nature or of any other offenses relating to the property and operation of the U. S. Government in the Leased Areas committed by U. S. service-men or nationals, British subjects or persons other than British subjects within the Leased Areas the (Article IV (1), 55 Stat. 1562)

> "United States shall have the *absolute right* in the first instance to assume and exercise jurisdiction with respect to such offense." (Italics supplied.)

A person charged with an offense under Article IV is to be dealt with by a United States Court and must be surrendered to the United States authorities if he is in the Territory* but outside the Leased Areas (Article VIII). The immigration laws of the Territory adjacent to the bases do not apply to the Leased Areas (Article XIII). United States postal facilities are to be established in the Leased Areas

* "Territory" as here used refers to all of Bermuda, not merely the Leased Area. See Art. XXX of the Agreement.

(Article XVI). No person in the Leased Areas serving or employed there can be subject to income tax or poll tax of the Territory adjacent to the bases (Article XVII). The Leased Areas are to *revert* to the "Lessor" only when abandoned by the United States with "notice of such abandonment." (Article XXI.)

Article XXIV of the Agreement (55 Stat. 1569) is significantly entitled "Possession" and states in part:

> "On the signing of this Agreement, leases of the Leased Areas * * * shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (*including transfer of possession* where it shall not previously have been transferred) * * * ." (Italics supplied.)

The Agreement does not specifically declare the Leased Area to be a "territory or part of the territory of the United States" but that expression is used in the Agreement in Article XI (4) (55 Stat. 1565):

> "(4) It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas."

And the *habendum* clause of the lease provides:

> "To HAVE AND TO HOLD the same for the full end and term of ninety-nine years * * *." (55 Stat. 1574).

OPINION OF CIRCUIT COURT.

The Circuit Court reversed the District Court and denied petitioners' motion for summary judgment. In its opinion (R. 65-73, reported in 164 F. (2d) 924), after consideration of the various provisions of the Lease and Agreement, and the scope of the grant to the United States, the Court stated (R. 68):

> "The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as 'possessions' of the United States."

The Court also held that the Federal Labor Standards Act was "broadly enough phrased * * * to cover American workmen at Bermuda bases, as fully as natives working in Samoa or Guam." (R. 69.)

As to the contention of petitioners, sustained by the District Court (R. 59-62, reported in 73 F. Supp. 860), that the question whether the Leased Area was a "possession" is a political one to be determined by the Executive or Legislative departments of Government, the Circuit Court held (R. 69-70):

> "Undoubtedly courts should avoid the determination of political issues, but it is difficult to see how this is such an issue. Before us is a matter of interpretation of an Act in issue between two groups of private parties. Obviously this arises in consequence of political acts, and those conceivably might have been of such precise form or exact agreement with a foreign state as to settle the question. But here they were not, and we must determine this private controversy, even if it arises as to areas affected by an agreement between nations. *Ex parte Cooper*, 143 U. S. 472, with full discussion at 499-503."

ARGUMENT.

POINT I.

THE FAIR LABOR STANDARDS ACT IS APPLICABLE TO THE LEASED AREAS, SINCE UNITED STATES HAS JURISDICTION AND CONTROL OF COMMERCE (AND CONSEQUENTLY OF CONDITIONS OF EMPLOYMENT IN SUCH COMMERCE) IN SAID AREAS. THEREFORE CONGRESSIONAL LEGISLATION WITH RESPECT TO COMMERCE WAS AUTHORIZED AND EFFECTIVE WITHIN THOSE AREAS.

In order that the issue here presented may be resolved it is necessary that it be placed in its proper setting.

The controversy here present involves labor performed by the respondents who were hired in the United States by the petitioners, American concerns, to perform labor in the Area leased to the United States in Bermuda, which were known to all of the parties to be under United States jurisdiction and control. Moreover at the time that the contracts were made and the labor was performed, the Fair Labor Standards Act was in effect. This Act represented a definite and settled American policy to establish minimum terms and conditions for labor in the interests of protecting the rights of labor and in the interests of promoting and establishing standards of business practice through the exercise of Federal power over interstate and foreign commerce (see, *supra* 29 U. S. C. A. § 202). This legislation indicates plainly an intention by Congress to extend to labor this basic protection concerning terms and conditions of labor, to the farthest reaches of Congress' power.

We are not here concerned with questions of international import respecting rights of sovereign powers against each other or possible intrusion of one power upon the rights or status of subjects of another power. This is a dispute between American subjects concerning their rights under an

American statute involving an American contract for carrying out an American governmental undertaking performed in a geographical area where the United States has jurisdiction and control. Before this Court is a controversy involving private rights, and this fact is not altered by the circumstance that the determination of those rights involves the interpretation of an Agreement and a Lease made between the United States and Great Britain.

It is in this framework that the issue in the present case must be set.

It is important to note that the question as presented by the petitioners in their brief (p. 2) is not correct and distorts the true question before this Court. The Circuit Court did not hold that the Leased Areas are "Territories and possessions" of the United States (in the sovereign sense of the words as the petitioners seem to imply) "with the consequence" that the Fair Labor Standards Act applied; but decided rather that within the grant of power granted to the United States by said Lease and Agreement in said Leased Areas the Federal Labor Standards Act was "broadly enough phrased" (R. 69) to cover the respondents working in the Bermuda bases.

It is difficult to see how the application of the provisions of an American statute to this dispute can possibly be of interest to any foreign power or how it could be considered an intrusion upon its sovereignty or affect this country's international relations with which the petitioners' and the Solicitor General's briefs are so expansively concerned. A realistic approach to what is here involved shows that the fine-spun technical questions concerning sovereignty and international relations which the State Department seeks to inject and to which the opposition briefs address themselves are unwarranted and far-fetched and have no real connection with the problem with which we are here concerned.

A. Congress Has Legislative Power Over Commerce in the Leased Areas.

The Fair Labor Standards Act is an exercise of the power of Congress over commerce. By the employment of this power Congress undertook to establish fair standards of working conditions for American workmen, "engaged in commerce" or "in the production of goods for commerce."

Tennessee Coal Co. v. *Muscoda Local*, 321 U. S. 590.

Moreover, as this Court has held,

> "* * * * It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 567.)
>
> *Overstreet* v. *North Shore Corp.*, 318 U. S. 125;
>
> *United States* v. *Darby*, 312 U. S. 100, 115;
> *29 U. S. C. A.* § 202.

As this Court said in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597:

> "* * * * [The provisions of the Fair Labor Standards Act], are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner."

And work standards on public projects require the same protection. (See *Walling* v. *Patton-Tulley Transp. Co.* (C. C. A. 6th Cir.), 134 F. (2d) 945, 949.)

Whether the Fair Labor Standards Act applies in the Leased Area depends on whether the United States had con-

trol and power over commerce there, and if so, whether Congress intended that Act to be effective there.

Under the Act "Commerce" means

> "trade, commerce, transportation, transmission or communications among the several States or from any State to any place outside thereof." (29 U. S. C. A. § 203[b]); and

"State" means

> "any State of the United States or of the District of Columbia or any Territory or possession of the United States." (29 U. S. C. A. § 203[c].)

From the foregoing definitions, the Finding and Declaration of policy made by Congress and the holdings of this Court, it is clear that the application of the Act reaches wherever Congress has power to act with respect to "commerce";* such power ceases only when "commerce" comes within the domain of another government.

United States v. *Chicago M. Ry. Co.*, 149 Fed. 487.

Bearing this in mind, does Congress lose its power over commerce when such commerce is in the Leased Area of Bermuda? If Congress has no power over commerce in that Area then the control over the commerce in the Leased Area must be in Great Britain or Northern Ireland or Bermuda itself. Further, must the Courts await a formal declaration from the Congress or the Executive, that these Leased Areas are (political) possessions of the United States before Congress can control the commerce there, and before private

---

* The cases cited in the opposing briefs, *McLeod* v. *Threlkeld*, 319 U. S. 491, and *10 E. 40th Street Co.* v. *Callus*, 325 U. S. 578, are not in point since they do not relate to the geographical extent of federal control but relate to the activities of the employees involved, whether they were "engaged in commerce" or "in the production of goods for commerce."

controversies can be settled? This declaration may never take place. During all this time is the control of commerce in a vacuum in these Leased Areas?

On repeated occasions this Court has determined the status of a geographical area for a particular case in determining whether that area was affected by a particular act of Congress, though no declaration had been made by Congress or the Executive. (See Pergler's *Judicial Interpretations of International Law*, Section 14, page 88, and cases cited; *De Lima* v. *Bidewell*, 182 U. S. 1.) The principle followed by the District Court that it is not within the province of courts to pass judgment upon the policy of legislative or executive action, is not applicable to the case at bar. That principle involves the rights of the Nation, "not individual rights." (Willoughby, *The Constitutional Law of the United States* (2d. Ed.), Vol. 3, p. 1326, *et seq.*) For, when

> "* * * private justiciable rights are involved in a suit, the court has indicated that it will not refuse to assume jurisdiction even though questions of extreme political importance are also necessarily involved.
>
> "Thus * * * treaties entered into by the United States not only bind the United States internationally, but creates municipal law for individuals so far as their personal rights and property are concerned. Thus a treaty, having been entered into the court will follow its terms even when, by doing so, it has to go counter to the position previously assumed by the executive department, or, indeed, contended for by the government in the case at bar.
>
> "In *Ex parte Cooper*, the court, after asserting the principle that it would not pass upon a matter purely political in character, was careful to say: 'We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if

those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of law specifically settling it, or authorizing the executive to do so, to render judgment, since we have no more right to decline jurisdiction which is given than to usurp which is not given.'" Willoughy, *The Constitutional Law of the U. S., ibid*, p. 1336.

So whether the Fair Labor Standards Act applies in the Leased Area of Bermuda will depend upon whether under the provisions of the Agreement and Lease, even though it is "public in its nature, which has not been determined by the political departments" (*Ex parte Cooper*, 143 U. S. 472, 503) United States has control over "commerce" there. The lease and agreement controls, it is submitted, even though the Congress or the Executive may take or have taken a position opposite to the express terms and meaning of the Agreement and Lease. Cf. *Rassmussen v. United States*, 197 U. S. 516.

The examination of the Lease and Agreement (55 Stat. 1560, *et seq.*) shows clearly that control of commerce in the Leased Area of Bermuda was yielded to and is vested in the United States. Under Article I of the Agreement the United States is given all necessary power "to provide access to and defense of the Leased Areas." Under Article II, (2) (*d*) the United States possesses the express right "to regulate and control within the Leased Areas all communications within, to and from the areas leased." The control of commerce in the Leased Area is so strongly vested in the United States by the Agreement that it has the right to interfere with the commerce of the adjoining Territories not leased (Article I, [3].)

Hence the United States had control over commerce in the Leased Area from the time the Lease went into effect, and there would be a suspension of any control over commerce

in the Area, unless the United States be regarded as having exercised that control. Actually (though not part of the record) there is no doubt that since the inception of the Lease, United States controlled such commerce.

Congress has power to legislate concerning commerce in the Leased Area not only by virtue of the provisions of the Agreement and Lease, but also by virtue of Article IV, Section 3, Cl. 2 of the Constitution, which provides:

> "The Congress shall have Power * * * to make all Rules and Regulations respecting Territory and other Property belonging to the United States."

The rights acquired by the United States under the said Lease are obviously "Territory and Property belonging to the United States." Hence under the Constitution, Congress has the right and power to legislate concerning commerce and other matters within that Area.*

Indeed Congress has actually recognized this right and has legislated in this Area in the matter of Workmens Compensation (55 Stat. 622), damage of property against enemy attack (56 Stat. 174) and jurisdiction of Navy Courts (57 Stat. 41). (See Petitioners' Brief, pp. 37-42.)

The opposing briefs admit Congress has power to enact the foregoing legislation affecting the Leased Areas; yet, the basic argument of the opposition against the application of the Fair Labor Standards Act in the Leased Areas is that since the United States lacks sovereignty over such Areas, Acts of Congress cannot be effective there. Still, they recognize the right and power in Congress to legislate specifically for the Area.

The only difference between these laws enacted by Congress to apply specifically to the Leased Areas and the Fair

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* "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory *or other property* belonging to the United States. It would be absurd to hold territory, and no power to govern it when acquired." *Mormon Church v. United States*, 136 U. S. 1, 42. (Italics supplied.) See also *Hoover & Allison Co. v. Evatt*, 324 U. S. 652, 673.

Labor Standards Act is that the former in express terms name the Leased Areas while in the latter no direct mention is made of the Leased Areas. This, then, is merely a matter of Congressional intent concerning the area in which the legislation should be effective and not a question of sovereignty. So, if Congress intended that the Fair Labor Standards Act should cover all areas within its jurisdiction and control that Act would perforce apply in the same manner as other enactments. If, however, sovereignty were a necessary prerequisite for making the Fair Labor Standards Act effective there, the same prerequisite would also be required for all other enactments.

As already indicated the purpose of the Fair Labor Standards Act is to extend federal control to the "farthest reaches" of commerce. Once goods enter the channels of federal commerce, control by Congress over their movement is preserved until such federal control is ended.

Walling v. *Jacksonville Paper Co., supra;*

McComb v. *Herlihy* (C. C. A., 4th Cir.), 161 F. (2d) 568.

Once the power of Congress attaches to commerce it does not cease until interstate or foreign commercial intercourse ends. (*Carter* v. *Carter Coal Co.*, 298 U. S. 238.) And that control of Congress continues and exists over commerce in the Leased Area of Bermuda by reason of the commerce clause and the power of Congress over territories and property belonging to the United States.

B. Fair Labor Standards Act Applies Even Though Enacted Prior to Acquisition of Leased Area.

We have demonstrated that Congress has full authority concerning commerce in the Leased Area, as "Territory or Property belonging to the United States" and by virtue of the provisions of the Lease and Agreement. We have also shown that the Fair Labor Standards Act is a Congressional

enactment for the regulation of commerce intended to extend to every area of federal control of commerce for the purpose of safeguarding and promoting the twin objectives of fair labor standards and of fair business practices (29 U. S. C. A. § 202, *Tennessee Coal Co.* v. *Muscoda Local, supra*). Hence this Act should be effective in the Leased Area unless there is any other basis for objection. The opposing briefs urge that the Act cannot apply because it was enacted prior to the acquisition of the Leased Area and special legislation by Congress would therefore be required to make it applicable.

This Court has set down the rule for determining the efficacy of a federal statute as applied to territories or possessions subsequently acquired by the United States in *Puerto Rico* v. *Shell Co.*, 302 U. S. 253. In that case this Court considered whether the Sherman Anti-Trust Act of 1890 was applicable in Puerto Rico upon its acquisition ten years thereafter. This Court said at p. 257:

> "Section 3 of the Sherman Act extends to 'any territory of the United States.' But it is urged that Puerto Rico cannot be brought within the intent of this phrase, and, therefore, the section does not apply to that dependency. The point is not well made. When the Sherman Act was passed (1890), we had no insular dependencies; and, necessarily, the application of § 3 did not extend beyond our continental domain; and, undoubtedly, it was this domain which was in the immediate contemplation of Congress. Certainly, Congress at that time did not have Puerto Rico in mind. But that is not enough. *It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act.* *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644; *Takao Ozawa* v. *United States*, 260 U. S. 178, 195-196; *United States* v. *Thind*, 261 U. S. 204, 207-208. The

> only question, therefore, is whether the word 'territory,' as used in § 3 of the Sherman Act, properly can be applied to a dependency now bearing the relation to the United States which is borne ~~by Puerto Rico.~~" (Italics supplied.)

In applying the rule thus stated and determining whether Congress would have excluded Puerto Rico had it foreseen its future acquisition, this Court considered the purpose and objectives sought to be obtained by the Sherman Act and concluded that the Act was applicable to Puerto Rico, saying at p. 259:

> "With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a 'territory' within the meaning of § 3 of the Sherman Act. We pointed out in the *Atlantic Cleaners & Dyers case, supra* (p. 435), that in the light of the applicable history and circumstances, it was apparent that Congress meant to deal comprehensively with the subject of contracts, combinations, and conspiracies in restraint of trade, 'and to that end to exercise all the power it possessed'; that while Congress in passing §1 exercised only the power conferred by the commerce clause, in passing § 3 it exercised a general power, unlimited by that clause. We therefore concluded that the word 'trade' as used in § 3 should be given a more extended meaning than the same word as used in § 1.
>
> "If, as we there determined, *Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter,—trade and commerce,—it is equally reasonable to conclude that Congress intended to include all territories to which its powers might extend.* The same reason which requires the utmost liberality of construction in respect of the word 'trade,' also requires the same degree of liber-

> ality of construction in respect of the word 'territory'; and we hold, accordingly, that the word 'territory' was used in its most comprehensive sense, as embracing all organized territories, whether incorporated into the United States or not, including Puerto Rico." (Italics supplied.)

See:

National Labor Relations Board v. *Gonzales Padin Co.* (C. C. A. 1st Cir.), 161 F. (2d) 353, 355;

Cases v. *United States* (C. C. A. 1st Cir.), 131 F. (2d) 916, 923, Cert. Den. 319 U. S. 770;

Crespo v. *United States* (C. C. A. 1st Cir.), 151 F. (2d) 44, 45, Cert. Dis. 327 U. S. 758.*

In the case of *Ozawa* v. *United States*, 260 U. S. 178, this Court said at page 194:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason for the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

The purposes and objectives of Congress in respect to the Fair Labor Standards Act are as comprehensive in scope

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* Compare the recent case of *Filardo* v. *Foley Bros., Inc.* (1948), 297 N. Y. 217, where the Court of Appeals held that the Federal Eight Hour Law applies to laborers on government construction work in a foreign country.

and coverage in respect of protection of labor standards in "commerce" as is the Sherman Act of business and trade standards in "commerce." It is therefore equally reasonable to conclude here as this Court concluded in the case of *Puerto Rico* v. *Shell Co., supra,* that Congress intended by the Fair Labor Standards Act "to exert all power it possessed in respect of the subject matter" and "to include all territories to which its powers might extend." Certainly it can not be suggested that the protection and promotion of fair labor standards (the subject of the Fair Labor Standards Act) was not intended by Congress to be as deserving of the benefits of the exercise of the full plenary power of Congress as was the protection and promotion of fair trade practices (the subject of the Sherman Anti-Trust Act).

In two New York cases squarely dealing with the question before this Court, each held the act applicable. *Eckert* v. *Elmhurst Contracting Co.*, 185 Misc. 108, 56 N. Y. S. (2d) 98, aff'd 186 Misc. 100, 61 N. Y. S. (2d) 730; *Croce* v. *Elmhurst Contracting Co.*, 74 N. Y. S. (2d) 445, aff'd — App. Div. —, 79 N. Y. S. (2d) 876.

We have shown that Congress has authority to legislate in the Leased Area in the field covered by the Fair Labor Standards Act both by virtue of the "Territory and Property" and "commerce" clauses of the Constitution as well as the provisions of the Agreement and Lease granting to the United States the control of commerce in the Leased Area; that by that Act, Congress intended to exercise its plenary powers of federal control over commerce for purposes of protecting the rights of labor and the elimination of unfair business practices; it therefore follows that regardless of the nature of the sovereignty or the territorial or property interest acquired by the United States over these Leased Areas, the Fair Labor Standards Act is effective thereto and applicable to the work performed by the respondents.

POINT II.

THE LEASED AREA IN BERMUDA FALLS WITHIN THE EXPRESSION "TERRITORY AND POSSESSION" OF THE FAIR LABOR STANDARDS ACT.

The main argument of the petitioners is on the contention that the Fair Labor Standards Act does not apply since the Leased Area is not in a "Territory or possession" of the United States within the definition of "State" in the Act. They contend that term "Territory or possession" is a "phrase of art" intended to cover Areas which were acquired by absolute grant or conquest and over which there is absolute sovereignty—that it does not include territory acquired by the United States short of absolute grant.

We have already shown that it is not necessary for the United States to have absolute sovereignty over the Leased Area in order to make the Fair Labor Standards Act applicable, nor to determine the question of sovereignty over the Leased Area to determine the issue in the case at hand. However, we believe that there is no reasonable basis for the point urged by the opposing briefs that the Leased Areas are not included within the general descriptive words, "Territory and possession" of the Act.

A.

At the outset it is important to recognize that the narrow interpretation that the petitioners attempt to give the terms, "Territory and possession" results in permitting the increase of hours of employment beyond the standards set in the Fair Labor Standards Act. Such an interpretation of the Act is contrary to the express words of the statute that no provision of the Act shall (29 U. S. C. A. § 218)

> "* * * justify any employer increasing hours of employment maintained by him which are shorter than the maximum laws applicable [under the Act]."

The opposition admit that there has never been a precise definition of the phrase "Territory and possession" and

assert that it should be given its ordinary meaning, which they contend is the narrow interpretation they urge.

In the Constitution the phrase "Territories and possessions" does not appear. The Constitution does specifically treat of the "Territory or Property belonging to the United States" (Art. IV, Sec. 3, cl. 2). In respect to this clause this Court, in *United States* v. *Gratiot, et al.*, 14 Peters 526, said (at p. 529):

> "* * * The term 'territory' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.' And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation. * * * "

It can hardly be contended that lands acquired by lease are not "Territory or Property belonging to the United States" within the view here expressed by this Court. Aside from this, taking the ordinary meaning of the phrase, "Territories or possessions" would quite clearly include any "lands" over which the United States has control, under a lease. It is difficult to see how a 99-year lease could be excluded from the phrase "Territory or possession" giving the phrase its ordinary meaning. (See also, opinion below, R. 69.)

Petitioners seek to rely upon the fact that in the administration of the Act, the Wage and Hour Division did not specifically include the Leased Areas. In the first place, it cannot be said that the Wage and Hour Division intended to exclude the Leased Area. This is clear from the answer made by the Wage and Hour Division to a direct inquiry on this very point (R. 55; 1946 Wage and Hour Cases 1276) where they said in part:

> "An examination of the legislative history of the Act relative to the meaning of the phrase 'territory or possession of the United States' does not reveal anything pertinent to the instant problem. Since these bases were secured from the British subsequent

to the passage of the Act, the particular problem under consideration did not then exist." * * *

"I believe that a determination regarding the status of these leased lands lies outside the province of the Wage and Hour and Public Contracts Divisions, and until the question has been settled by court decisions, congressional or executive acts, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees at bases leased from the British.

"I regret that the nature of your problem is such that I can not give you a more definite answer * * * "

In the second place if the Court finds that the Statute is applicable, the rulings of the Administrative Agency to the contrary cannot stand in the way of according laborers the rights guaranteed to them by the Fair Labor Standards Act (See *Bay Ridge Operating Co.* v. *Aaron*, — U. S. — , 68 S. Ct. 1186.) Significantly the Wage and Hour Division has not intervened in support of petitioners' position herein. The Solicitor General's intervention herein appears to be at the instance of the State Department, which concluded that the Circuit Court in determining the issues between the private parties hereto had decided a political question affecting our foreign relations (Mem. on behalf of U. S. in support of Pet. for Cert. pp. 7-8):

B.

The Wage and Hour Division did, however, in its rulings, include the Panama Canal Zone within the coverage of the phrase "Territory or possession" in the Act. The fact that the Wage and Hour Division specifically included the Canal Zone indicates however that its view of the intended coverage of the Act is not the narrow one urged by the petitioners. For, if, as petitioners urge, that absolute sovereignty based upon acquisition by outright cession or

conquest is required the inclusion of the Canal Zone by the Wage and Hour Division is definitely improper.

It is unnecessary to enter here into a detailed examination or discussion of the terms and conditions covering the rights and interests of the United States in the Canal Zone as does the opposition. For present purposes, it is sufficient to point out that the Canal Zone was not absolutely ceded to the United States. The United States acquired only a grant of that territory for a specific and limited purpose accompanied by a grant of all necessary and essential authority in that area for carrying out that purpose. The situation with respect to the Leased Areas involved in the case at bar is clearly analogous. For here also the United States acquired a grant of territory for a specific and limited purpose accompanied by a grant of all necessary essential authority for carrying out that purpose. The fact that the grant of Canal Zone is in perpetuity while the grant here is for 99 years does not alter the basic fact that the two grants are of a similar nature. Hence, if the Canal Zone is a "Territory or possession" within the Act, so, also, is the Leased Area.

Furthermore in *Wilson* v. *Shaw*, 204 U. S. 24, 33, this Court held that for carrying out the purposes of the Canal Zone grant such Zone is a territory of the United States. It can hardly be suggested that the purposes for which the Leased Area was acquired are any less important to the defense and welfare of the United States than the Panama Canal. Indeed in these days of air warfare, the Leased Areas are essential to the protection of Panama Canal itself. Under the circumstances, it is therefore "hypercritical" (*Wilson* v. *Shaw*, *supra*, at p. 33) to contend that these Leased Areas are not "Territory or possession" of the United States.

C.

The opposing briefs urge that a territory or possession of this country can only be obtained by outright cession or by conquest, and they point to the fact that historically that is

the manner in which we have acquired territories and possessions (Pet. Br., pp. 10-12, 17-19). This overlooks the fact that in this century the concept of international relations has altered that traditional method of acquiring territory by outright cession or by conquest. For our national defense we required the areas leased to us by Great Britain. In an earlier era a country as powerful as the United States might well have acquired these areas as like areas were taken by other nations, through force and conquest, as for example, the case of Gibraltar, Malta, Cyprus, Rhodes *et cetera*. Had these Leased Areas been acquired in this manner then the petitioners would not find any reason for holding the Fair Labor Standards Act inapplicable. Can it be said that because we acquired these Leased Areas, to quote from the Agreement itself, "in a spirit of good neighbourliness between the Government of the United States of America and the Government of the United Kingdom" (55 Stat. 1560) that the said Areas are not "Territories or possessions" of the United States within which the objectives of the Fair Labor Standards Act may be carried out?

The precise legal effect of leases between nations has received consideration by authorities in the field of International Law. T. J. Lawrence in his treatise on *Principles of International Law* (6th Ed. 1915, pp. 175-177) indicates that the effect of these leases is greater than what is usually intended by "lease" in private law where "both lease and usufruct imply that property continues to belong to the grantor, while the grantee has the use and benefit of it for the time and under conditions fixed in the grant," concluding (p. 176):

> "* * * for all purposes of war and neutrality leased territory must be regarded as a part of the dominion of the power that exercises full control over it. In fact, the attempt to separate property or sovereignty on the one hand from possession on the other, by the use of phrases taken from the law of lease or usu-

fruct, is in its nature very deceptive. The terms in question are mere diplomatic devices for veiling in decent words the hard fact of territorial cession."

Status of the leased territory must be decided by reference to fundamental principles and by terms of the contract. (See note on *Lease of Chinese Territory to Germany,* Wilson in 1902 Int. Law Sit. Naval War College, p. 28.) Charles G. Fenwick in his work on *International Law* (1924) states (at p. 243):

> "Within recent years states have frequently resorted to long term leases as a means of securing control of territory, without prejudicing the formal sovereignty of the lessor state * * * it would seem that the sovereignty of the lessor state over the territory is more nominal than real."

This author considers the treaty covering the Panama Canal Zone to be in the nature of a lease.

On page 15 of petitioners' brief there appears a quotation that "sovereignty is regarded 'too important a matter' to pass with a lease." A reading of the editorial from which the quotation was taken (George Grafton Wilson, *Leased Territories* (1940), 34 Am. J. Int. Law, p. 704) reveals that this comment was made by a representative of Japan and was not in line with the conclusions reached by other nations. The statement as made by petitioners is out of context and clearly misleading. It was made by a Japanese minister in connection with lease of Port Arthur by China to Russia for a period of 100 years. The cited editorial, at page 703, reads in part as follows:

> "* * * When the general question became acute in 1900, the Minister of the United States in China reported to Secretary Hay: 'I have conferred with the English, German, Russian, French, Spanish, Netherlands and Japanese ministers, and all of them, except the Japanese, say that control over all of these

> leased ports has, during the existence of the lease, passed as absolutely away as if the territory had been sold outright * * * ' After much correspondence, Secretary Hay concluded that the effect of China's foreign leases was the 'relinquishment by China during the term of the leases and the conferment upon the foreign Powers of all jurisdiction over the territory.'"

And the editorial concludes with the following statement part of which petitioners quoted:

> "Sometimes the distinction between transfer of sovereignty and a lease by international convention differs little in actual operation; but, as the Japanese claimed in 1900, 'sovereignty is too important a matter to pass thus with a lease.'"

(See also the recent discussion entitled *On Relative Sovereignty*, Hans Aufricht, 30 Cornell L. Q. 137, 154; Wilson, *Handbook on International Law* (1939) 93, where author ostensively considers legal status of Canal Zone as based upon a lease.)

There is no question that a nation that acquires a lease on foreign territory for but a limited purpose is entitled to exercise "those rights of territorial jurisdiction which are expressly conferred by the underlying agreement" (30 Cornell L. Q. 154). That the United States has that territorial jurisdiction over commerce within the Areas leased to it by Britain cannot be questioned or denied. It is submitted, therefore, that the Fair Labor Standards Act which is an exercise of the authority of Congress over commerce to the full extent of its power in that field is effective in the Leased Areas and that such Areas are a "Territory or possession" within the purview of the Act.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT, FOR THE REASONS SET FORTH, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

SOL L. FIRSTENBERG,
JACOB BROMBERG,
Attorneys for Respondents.

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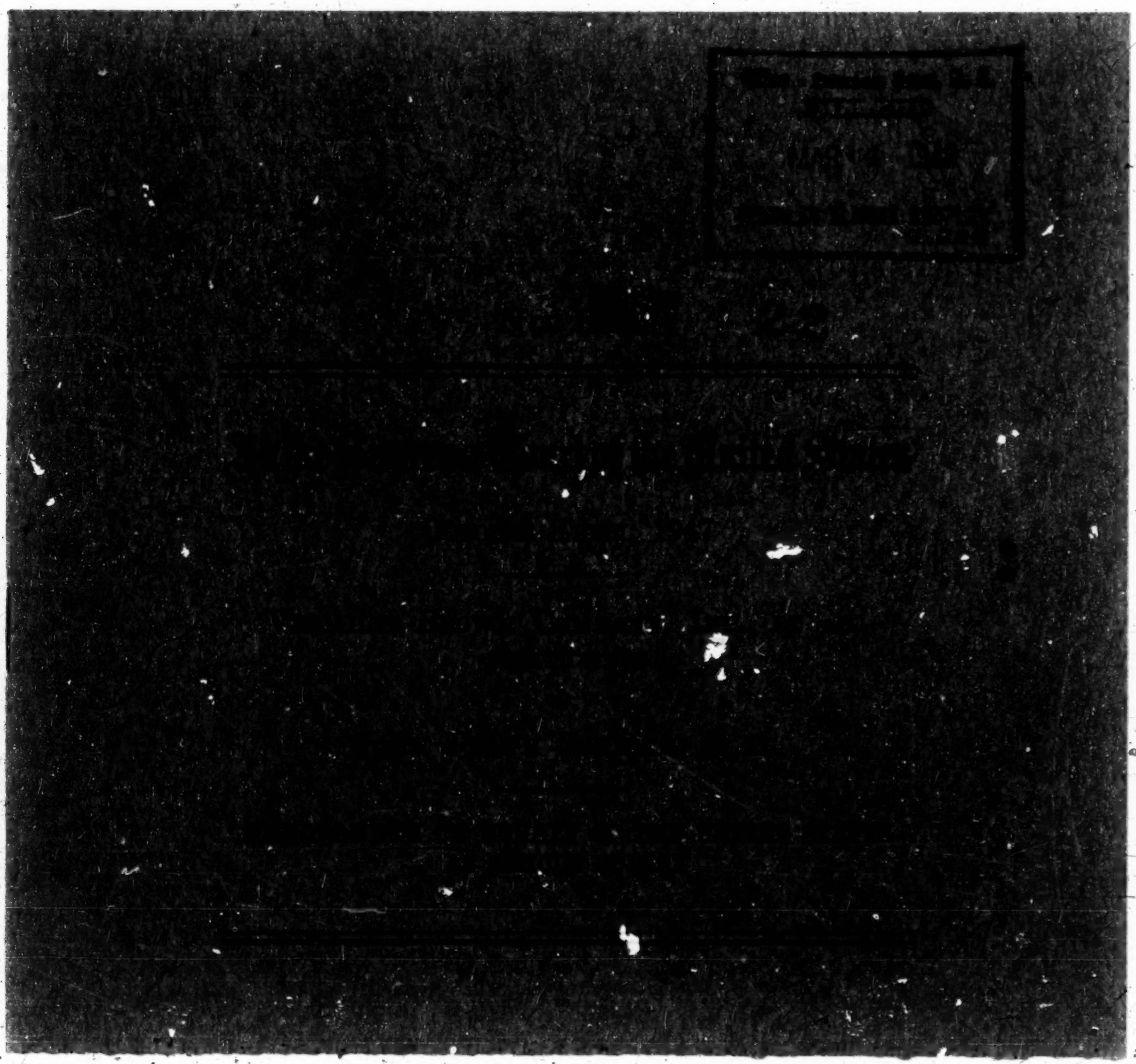

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 608

VERMILYA-BROWN COMPANY, INC., ET AL.,
PETITIONERS

v.

JOHN JOSEPH CONNELL, ET AL.

MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

In this suit for overtime compensation brought against a cost-plus contractor with the United States, the Second Circuit Court of Appeals has held that the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*, "* * * applies to work done on an Outlying Defense Base in Bermuda obtained by the United States under a 99-year lease and executive agreement with the British Government on March 27, 1941. * * * " Precisely, the court below decided that the interest in a military base, here the Bermuda Base, acquired by the United States from Great Britain under the Leased Bases Agreement of 1941, was such as to constitute such base a "* * * Territory or possession of the

United States * * *" within the meaning of Section 3 (c) of the Fair Labor Standards Act, *supra.* 29 U. S. C. 203 (c).

This case is important both because of the large amount of overseas construction presently being prosecuted in military bases acquired under agreements the same as or extremely close to the agreement here involved, and because of the possible affect upon our foreign relations of the holding that the leased bases are "possessions" of the United States. In view of the factor last mentioned, this Department requested the views of the Department of State. The State Department, in a letter attached hereto as an appendix, has concluded that "The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States.", and that it "* * * regards as unfortunate the conclusion of the Court that the U. S. exercises as complete control in the leased areas as in other areas long known as 'possessions' of the U. S., * * *." That Department further states that the holding of the Second Circuit Court of Appeals herein "* * * would not in the Department's view be calculated to improve our relations with that Government [Great Britain]

* * *" and "* * * might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought. * * *"

The position of the State Department on a matter of this sort is entitled to the highest weight.

Accordingly, because of the importance of the question presented and the difference between the decision below and the views of the State Department, we urge that the petition for certiorari be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1948.

APPENDIX

DEPARTMENT OF STATE,
Washington, January 30, 1948.

[In reply refer to LE/M]

The Hon. TOM CLARK,
Attorney General.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to Mr. Peyton Ford's letter of January 2, 1948, calling attention to the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *John Joseph Connell et al.* v. *Vermilya-Brown Company, Inc., et al.* in which it was held that the defense bases in Bermuda are possessions of the United States within the meaning of the Fair Labor Standards Act of 1938. A copy of the opinion was enclosed and an expression of the Department's views concerning the correctness and desirability of the holding were requested in view of the possible implications of the decision from the standpoint of the international relations of the United States.

In arriving at its decision the Court pointed out that under the Leased Bases Agreement of March 27, 1941, the United States is given broad authority within the leased areas appropriate for their control and defense and added that:

> Other provisions also serve to show the nature of the grant. Thus the United States is given the "absolute right" to assume and exercise jurisdiction of all of-

fenses within a leased area, by a British subject "apprehended therein," and by any other person, without restriction, with provision for surrender of offenders to the appropriate authority of the Territory if the United States so elects, Art. IV (1, 2), and for surrender of offenders to the United States authorities where they are within the Territory, but outside the leased areas, Art. VIII. The immigration laws of the territory adjacent to the bases do not apply to the leased areas, Art. XIII. United States postal facilities are to be established in the leased areas, Art. XVI. No person in the leased areas serving or employed there can be subject to income tax or poll tax of the territory adjacent to the bases, Art. XVII. The leased areas are to revert to the "Lessor" only when abandoned by the United States with "notice" of such abandonment, Art. XXI. And Art. XXIV, significantly entitled "Possession," provides: "On the signing of this Agreement, leases of the Leased Areas, substantially in the forms respectively set out in Annex II hereto, shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (including transfer of posession where it shall not previously have been transferred) shall thereupon become effective immediately, and pending execution of such Leases they may be exercised *ad interim* and possession of the Leased Areas shall be immediately given so far as the location thereof is then ascertained. Where the precise location of a portion of any Leased Area is not ascertainable until more detailed descriptions are available, possession of such

portion shall be given as rapidly as possible." 55 Stat. Pt. 2, 1569.

The Agreement does not specifically declare the leased areas to be part of the territory of the United States. It does contain, however, the following interesting negative provision: "It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." Art. XI (4), 55 Stat. Pt. 2, 1565.

The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as "possessions" of the United States.

Under Art. IV (1) the United States does not have "the absolute right" of jurisdiction over the offenses enumerated therein but only the absolute right "in the first instance" to assume and exercise jurisdiction with respect to such offenses. The jurisdiction over offenses conferred on the United States by Art. IV is a limited jurisdiction, and is not confined to the leased areas but in some aspects extends also to the whole Territory in which the base is situated. During the war the U. S. has been granted *exclusive* jurisdiction over offenses committed by members of its armed forces stationed in many foreign countries; likewise exemptions from immigration laws, permission to establish postal facilities, exemption from income and other taxes, have been or are enjoyed by members of the

armed forces of the United States and other governmental personnel in many foreign countries without any suggestion that by the grant of such rights and privileges the foreign sovereign concerned has surrendered its sovereignty or bargained away its possessions. The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States.

The Department regards as unfortunate the conclusion of the Court that the U. S. exercises as complete control in the leased areas as in other areas long known as "possessions" of the U. S., and its specific reference in this connection to the Philippine Islands, Swains Island, Samoa, Guam and the guano islands over all of which the U. S. exercises sovereignty, except the Philippines over which sovereignty was exercised until they were given their independence on July 4, 1946, and except the guano islands, over which, in general, the U. S. exercises exclusive jurisdiction and no other nation claims sovereignty.

Any holding that the bases obtained from the Government of Great Britain on 99 year leases are "possessions" of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases

are now held or in which they might in the future be sought. The Department is not clear that the Court has so decided in the case under reference, but it feels that the matter is not free from doubt and in view of the possible implications that it should not be left in that state.

The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States. The leased areas are to be held by the United States for the stated period for certain specified uses of a military nature; and the United States is not free to use them as it would its own property. This is evident from certain provisions of the Agreement of March 27, 1941. For instance, businesses cannot be established or professions practiced in the leased areas (Art. XVIII), nor can wireless stations be established or submarine cables landed except for military purposes (Art. XV), without the consent of the government of the Territory concerned, and commercial aircraft cannot operate from the bases without the consent of the Government of the United Kingdom (Art. XI). Furthermore, the United States cannot assign or underlet or part with the possession of the whole or any part of any leased area, or of any right, power or authority granted by the leases or the Agreement (Art. XXIII). The restrictions placed on use of the bases by the United States and the term of the lease are inconsistent with the conception of "possessions" of the United States as applied to the areas mentioned in the Court's opinion.

It may be of interest in connection with the foregoing to point out that the Act approved March 27, 1942 (56 Stat. 176), affords protection through the War Damage Corporation to property "situated in the United States (including the several states and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States."

The Legislative history of the bill shows that during the debate in the House on March 2, 1942, Mr. Springer inquired what places were included in the final phrase "in such other places, etc." Mr. Dewey replied:

> As I recall—and I can be corrected by my colleagues if I don't state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States wherein there may be private property connected with them.

None of Mr. Dewey's colleagues did in fact correct this statement in any way. (Congressional Record, Proceedings and Debates of the 77th Congress, Second Session (Paper Edition, temporary paging), 1907.)

It would therefore appear that Congress considered this phrase necessary in order to extend coverage under the War Damage Act to the leased bases, even though the phrase "territories and possessions" was also used.

It is hoped that the above views will be of assistance to the Attorney General in determin-

ing what further action should be taken with respect to the case under consideration.

Sincerely yours,

[s] Ernest A. Gross,
ERNEST A. GROSS,
The Legal Adviser.
(For the Secretary of State.)

U. S. GOVERNMENT PRINTING OFFICE: 1948

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and documents involved	2
Statement	3
Interest of the United States	5
Summary of Argument	5
Argument	9
I. The phrase "possessions of the United States" of Section 3(c) of the Fair Labor Standards Act is used in its ordinary sense and not in a sense peculiar to that Act	11
A. The legislative history of the Act indicates that "possession of the United States" was used in its ordinary sense	12
B. The Administrator of the Wage and Hour Division has interpreted "territory or possession of the United States" as having its ordinary meaning	14
II. The Bermuda bases are not possessions of the United States	18
A. The leasing of the bases does not involve the transfer of sovereignty essential to these areas becoming possessions of the United States	18
1. Right of sovereignty over area is essential to area's being "possession of the United States"	18
(i) The possessions generally	18
(ii) Guantanamo Naval Base	22
2. No transfer of sovereignty is involved in the leasing of the Bermuda bases	25
(i) The negotiations	26
(ii) The leases and the agreement	28
B. The Executive Department has determined that the Bermuda base is not a possession of the United States	33
C. Congress likewise has not regarded the leased areas as possessions of the United States	38
III. The Fair Labor Standards Act does not cover employees engaged in "commerce" outside the United States, its Territories and possessions	40
Conclusion	48

Page

Appendix A: State Department letter 49
Appendix B: Wage and Hour Division letters 55

CITATIONS

Cases:

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607 46
American Banana Company v. *United Fruit Company*, 213 U. S. 347 42
Balzac v. *Porto Rico*, 258 U. S. 298 10
Bernhard v. *Metcalfe Const. Co.*, 64 F. Supp. 953 41
Blackmer v. *United States*, 284 U. S. 421 42
Blain, Ex parte, 12 Ch. Div. 522 (1879) 42
Burns v. *Metcalfe Const. Co.*, 69 F. Supp. 381 41
Chatwin v. *United States*, 326 U. S. 455 43
Cincinnati Soap Co. v. *United States*, 301 U. S. 308 21
Crowe v. *Elmhurst Contracting Co.*, 74 N.Y.S. (2d) 445, affirmed, 79 N.Y.S. (2d) 876 10
Delassus v. *United States*, 9 Pet. 117 18
DeLima v. *Bidwell*, 182 U. S. 1 10
Domenech v. *National City Bank*, 294 U. S. 199 21
Dooley v. *United States*, 182 U. S. 222 10
Downes v. *Bidwell*, 182 U. S. 244 10
Eckert v. *Elmhurst Contracting Co.*, 185 Misc. 108, affirmed, 186 Misc. 100 10
Filardo v. *Foley Bros., Inc.*, 181 Misc. 136 41
Fourteen Diamond Rings v. *United States*, 183 U. S. 176 20
Galban & Co. v. *United States*, 40 C. Cls. 495, affirmed *per curiam*, 207 U. S. 579 ..... 20, 21
Hawaii v. *Mankichi*, 190 U. S. 197 19
Hilton v. *Sullivan*, 334 U. S. 323 46
Holy Trinity Church v. *United States*, 143 U. S. 457 43
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652 ..... 21, 47
Jones v. *United States*, 137 U. S. 202 33
Kirschbaum Co. v. *Walling*, 316 U. S. 517 45
Luckenbach S. S. Co. v. *United States*, 280 U. S. 173 19
McLeod v. *Threlkeld*, 319 U. S. 491 45
Neely v. *Henkel*, 180 U. S. 109 20
Pearcy v. *Stranahan*, 205 U. S. 257 33
Posadas v. *National City Bank*, 296 U. S. 497 20
Puerto Rico v. *Shell Co.*, 302 U. S. 253 10
Rassmussen v. *United States*, 197 U. S. 516 20
Smith v. *Townsend*, 148 U. S. 490 43
State v. *Carter*, 27 N. J. (3 Dutcher) 499 42
Strother v. *Lucas*, 12 Pet. 410 18
10 E. 40th St. Co. v. *Callus*, 325 U. S. 578 45
United States v. *Carbone*, 327 U. S. 633 43
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304 ..... 33, 42
United States v. *Flores*, 289 U. S. 137 42

Cases—Continued

	Page
United States v. *Percheman*, 7 Pet. 51	19
Walling v. *Jacksonville Paper Co.*, 317 U. S. 564	45
Williams v. *Suffolk Ins. Co.*, 13 Pet. 415	33
Wilson v. *Shaw*, 204 U. S. 24	19

Statutes and Charter:

	Page
Act of March 2, 1901, 31 Stat. 895	22
Act of August 19, 1916, 39 Stat. 545, 547, Sec. 5	15
Act of March 27, 1942, 56 Stat. 174, 176	39
Air Commerce Act of 1926, 49 U.S.C. 171, 179(b)	12
Bank Conservation Act, 48 Stat. 2, 12 U.S.C. 202	11
Civil Aeronautics Act, 49 U.S.C. 401	12
Commodities Exchange Act, 7 U.S.C. 2	12
Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. 201 *et seq.*):	
Sec. 2	43
Sec. 3(b)	2
Sec. 3(c)	2, 9, 12
Sec. 6	2
Sec. 7	2
Sec. 13	41
Federal Communications Act of June 19, 1934 (48 Stat. 1064, 1065, 47 U.S.C. 153(g), (v)), Section 3	11
Federal Employers' Liability Act (35 Stat. 65, 45 U.S.C. 52), Section 2	11
Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321(a)	12
Federal Seed Act, 7 U.S.C. 1561(a)(3)	12
Federal Trade Commission Act (38 Stat. 717, 719, 15 U.S.C. 44), Section 4	47
Filled Milk Act, 21 U.S.C. 61(b)	12
Firearms Act, 15 U.S.C. 901(2), (7)	12
National Labor Relations Act, (49 Stat. 449, 450, 29 U.S.C. 152(6)), Section 2(6)	47
Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. 501(e)	22
Packers and Stockyards Act, 7 U.S.C. 182(6)	12
Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C., Supp. I, 251	16
8 Stat. 200, 202	18
8 Stat. 252, 254	18
15 Stat. 539	19
30 Stat. 750	19
30 Stat. 1754, 1755	19, 20
31 Stat. 41, 48 U.S.C. 491	10
31 Stat. 1878, 1879	19
33 Stat. 2234-2235	19
37 Stat. 512, 48 U.S.C. 21	10
39 Stat. 1706	19
45 Stat. 1253	19

Statutes—Continued — Page

55 Stat. 1574-1589 — 28
Surplus Property Act of 1944, 50 U.S.C. App. 1612(i), Sec. 2 — 12
Tariff Act of 1922, 42 Stat. 858, 19 U.S.C. 121 — 16, 24
39 U.S.C. 283, 654 — 12
42 U.S.C. 201(g) — 12
United Nation Charter (59 Stat. 1033, 1048), Article 73(e) — 37

Miscellaneous:

Agreement of July 2, 1903, 1 Malloy *Treaties* (1910) — 23
Art. III — 23
IV — 23
V — 24
81 Cong. Rec. 4960, 4961 — 43
81 Cong. Rec. 7921-7925 — 44
81 Cong. Rec. 7957 — 13
82 Cong. Rec. 1573 — 13
83 Cong. Rec. 9250 — 13
88 Cong. Rec. 965 — 38
88 Cong. Rec. 1851 — 39
Dept. of Labor Interpretive Bulletin No. 2, Oct. 17, 1938 (Wage and Hour Manual (1942 Ed.), p. 30) — 14
Exchange of Notes, Lease and Agreement between the United States and Great Britain, 55 Stat. 1560-1599 — 3, 26
Executive Agreement Series No. 235, Leased Naval and Air Bases (GPO 1942), pp. 14-15, 20, 17-34, 41, — 3, 26, 28, 29-32
12 F. R. 4583-4584, 29 C.F.R. 1947 Supp. Sec. 776 — 16
1 Hackworth, *Digest of International Law*, p. 421 — 18
2 Hackworth, *Digest of International Law*, pp. 172-173 — 19
Hearings on H. R. 5096, House Committee on the Judiciary, 77th Cong., 1st sess., tr. 22-23, 25 — 27, 28
H. Doc. 255, 75th Cong., 1st sess., p. 1 — 43
H. Doc. 943, 76th Cong., 3d sess., pp. 1, 5 — 27
H. R. 6382, 77th Cong., 2d sess. — 39
H. Rep. 1452, 75th Cong., 1st sess., pp. 11-12 — 13
H. Rep. 2182, 75th Cong., 3d sess., p. 2 — 13
H. Rep. 2738, 75th Cong., 3d sess., pp. 2, 13, 21 — 13
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Hyde, *International Law* (2d Ed., 1945), p. 358 — 18
Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st sess., pp. 77, 113, 134-135, 208, 257, 287, 302-303, 354-355, 375, 417-420, 509, 814 — 44
1 Lauterpacht, *Oppenheim's International Law* (5th Ed., 1937), pp. 430, 431 — 18

Miscellaneous—Continued

	Page
1 Malloy, *Treaties* (1910), pp. 358-359, 360-361	22, 23
Official Answers to Questions, Wage and Hour Manual (Cum. Ed., 1944-1945), p. 116	44
34 Op. Atty. Gen. 287	21
35 Op. Atty. Gen. 536, 540-541	16, 24, 26
39 Op. Atty. Gen. 484, 485, 487, 488	27, 34
40 Op. Atty. Gen. No. 10 (April 16, 1941)	19
117 *Parliamentary Debates, House of Lords*, 367	27
364 *Parliamentary Debates, House of Commons*, 1170-1171	26
S. 2198, 77th Cong., 2d sess.	39
S. 2475, 75th Cong., 1st sess.	13
S. Rep. 884, 75th Cong., 1st sess., pp. 5-6	13
S. Rep. 1012, 77th Cong., 2d sess., pp. 2-3	38
Summary of Information transmitted by the Government of the United States of America (U. N. Release A/320, 25 July 1947), p. 1	19
The United States and Non-Self-Governing Territories (GPO 1947), p. 21, n. 1	19
United Nations, Non-Self-Governing Territories, Summaries of Information Transmitted to the Secretary General during 1946 (U. N. Publications 1947), pp. 101-129, 134	19, 37
Wilson, *Leased Territories*, 34 Am. J. of International Law, 703, 704	25, 28
Winant, *Letters from Grosvenor Square* (1948), pp. 33-38	27

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., ET AL.,
PETITIONERS

v.

JOHN JOSEPH CONNELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 59-62) is reported at 73 F. Supp. 860. The opinion of the United States Court of Appeals for the Second Circuit (R. 65-73) is reported at 164 F. 2d 924.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on

November 28, 1947 (R. 73). The petition for a writ of certiorari was filed on February 19, 1948, and was granted on March 29, 1948 (R. 75). 333 U. S. 859. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a base held by the United States under lease from Great Britain pursuant to the Exchange of Notes of September 2, 1940, between the two Governments and the Leases and Agreement signed March 27, 1941, is a "Territory or possession of the United States" within the meaning of Section 3(c) of the Fair Labor Standards Act.

STATUTES AND DOCUMENTS INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. 201 *et seq.*) covers all employees, with certain exceptions not here material, who are "engaged in commerce or in the production of goods for commerce." Sections 6, 7.

Section 3 of the Act contains the following pertinent definitions:

> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
>
> (c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Petitioners have filed separately for the convenience of the Court, the printed document entitled *Executive Agreement Series 235, Leased Naval and Air Bases* (GPO, 1942) which contains the Exchange of Notes, Lease and Agreement between the United States and Great Britain (55 Stat. 1560-1599) relating *inter alia*, to the leased bases involved in this case.

STATEMENT

Pursuant to an Exchange of Notes on September 2, 1940, the United States and Great Britain, on March 27, 1941, entered into an Agreement and Leases, whereby Great Britain agreed to lease to the United States for ninety-nine years, certain areas in Bermuda as well as Newfoundland, Jamaica, St. Lucia, Antigua, Trinidad, British Guiana and the Bahama Islands for use as naval and air bases, under the terms and conditions set forth in these documents. The United States, through the Corps of Engineers, United States Army, entered into a contract with the respondents as joint contractors for the construction of the Outlying Defenses Base known as Fort Bell and Kindley Field in Bermuda. Respondents are eleven of petitioners' employees, engaged to perform the duties of policemen and firemen required in connection with this construction contract. These duties were performed at the site of the project in Bermuda.

After returning to the United States, respondents on October 20, 1945, brought this suit against

petitioners in the Supreme Court of the State of New York, County of New York, seeking to recover overtime compensation, liquidated damages and attorneys' fees in accordance with the provisions of the Fair Labor Standards Act (R. 2-8). After removal of the suit to the United States District Court for the Southern District of New York (R. 1), petitioners by amended answer denied the pertinent allegations of the complaint and pleaded as a separate defense that respondents were not covered by the Act (R. 8-9). Petitioners thereafter moved for summary judgment (R. 12-13), on the grounds, (1) that the Fair Labor Standards Act has no application to the respondents' employment in the leased areas of Bermuda; (2) that respondents were engaged in work of original construction and were, therefore, not covered by the Act; and (3) that two of the respondents were exempt from the provisions of the Act as executive and administrative employees (R. 60). Various affidavits and depositions were filed by both parties on this motion (R. 13-59).

The District Court granted petitioners' motion for summary judgment and dismissed the complaint on the merits (R. 62-63) In its opinion, the court commented that respondents made "no contention that any of these leased areas is a 'Territory' of the United States, but they insist that such areas are possessions of the United States" (R. 60-61). The court stated, "Whether [the leased areas] are possessions of the United States depends

on whether they are within the sovereign jurisdiction of the United States. That is a political question to be determined by the legislative and executive departments of the government" (R. 61), and these departments "have clearly indicated that these leased areas are not within the sovereign jurisdiction of the United States" (R. 61). Accordingly, it held that "the Fair Labor Standards Act has no application to the employment of the * * * [respondents] in the leased areas of Bermuda" (R. 60). This determination, the court concluded makes it "unnecessary to pass on the other contentions of the * * * [petitioners]" (R. 62). On appeal, the court below reversed (R. 73).

INTEREST OF THE UNITED STATES

The Government is interested in this case primarily because the Department of State is seriously concerned as to the possible effect upon our foreign relations of a holding that various leased naval and air bases in British territories are "possessions" of the United States, and secondarily because of the large amount of construction work let to private contractors on a cost-plus basis at these and other bases required under agreements the same as or extremely close to the agreement here involved.

SUMMARY OF ARGUMENT

The Bermuda bases were not acquired until after the enactment of the Fair Labor Standards Act, although at that time, the United States operated, under a similar lease, the Guantanamo Naval Base. The question here raised is one of statutory con-

struction, whether these bases are "possessions of the United States" within the meaning of the Act and hence included within its coverage.

I. The phrase "Territory or possession of the United States" in the Fair Labor Standards Act was used not in a sense special to that Act but in the same sense as in a variety of other statutes, where it has become virtually a phrase of art, to cover only those areas long known as Territories and possessions. That the phrase was not intended to be given a meaning broader than customary appears from the fact that "possession" was inserted over the initial protest of the House of Representatives and was allowed to remain only as a a result of the conference between the managers on the part of both Houses, and from the fact that nothing was said to indicate that anything but the usual meaning was intended.

The Wage and Hour Division, the agency charged with the administration of the Fair Labor Standards Act, administratively construed "possessions" in its ordinary sense in 1938, when the only leased area operated by the United States was Guantanamo Naval Station. The Division reissued this interpretation, after reexamination, in 1947, although by that time, the leased areas here involved had been acquired. This construction has been adhered to in response to specific inquiries.

II. The Bermuda bases are not "possessions of the United States" in the ordinary sense. The British and American officials participating in the

proceedings leading up to the formal Lease and Agreement were in accord that no transfer of sovereignty over these areas to the United States was involved, which transfer is essential to the acquisition of a "possession." Transfer of sovereignty was involved in the acquisition of the areas long known as possessions of the United States, but on the other hand, no transfer of sovereignty was involved in the acquisition of the Guantanamo Naval Station which, while acquired under a lease vesting in the United States substantially broader rights than those granted by the lease here involved, is uniformly recognized as not being a possession of the United States. Moreover, both the Lease itself, which is phrased in terms of "demise," not cession of sovereignty, and the provisions of the Agreement are consistent with the understanding of the participating officials, and demonstrate that the tenure of the United States was to be that of lessee, and not that of sovereign. These provisions indicate that the United States thereby acquired a mere governmental outpost, over which its control fell far short of the complete control obtained in the other areas long known as "possessions" of the United States.

Both the executive and legislative departments have regarded the bases here involved as not being "possessions" of the United States. The Attorney General has so stated, and the Department of State has consistently taken that position. Congress in legislation has indicated the same understanding. These views, as this Court has long recognized, are

entitled to great, if not conclusive weight, since the present controversy involves a political question, affecting our relations with Great Britain and potentially other foreign countries which have leased bases to the United States on similar terms and conditions.

III. The alternative independent ground advanced by respondents in support of the judgment below, that they fall within the literal terms of the definition of commerce—"from any State to any place outside thereof"—is without substance. It ignores the geographic limitations of the Act implicit in the definition of "State," as well as the purpose of that portion of the commerce definition, which was to assure that employees located in the United States and engaged in activities in connection with exportation would be covered. It also disregards the usual canon of construction that all legislation is *prima facie* territorial, and overlooks the primary purpose of the Act, which, was to improve domestic, not foreign, conditions of employment. In addition, the fact that Congress did not exhaust its constitutional authority in the continental United States or over the territories and possessions, militates against any suggestion that Congress intended, nevertheless, to exercise whatever extraterritorial power it had. Finally, respondent's suggested limitation on the phrase "to any place outside thereof" to include only places "where the federal government controls the flow of commerce", while possibly resulting in includ-

ing respondents within the Act, would have the consequence of placing a substantial limitation on the Act's coverage contrary to the clear intent of Congress.

ARGUMENT

The Fair Labor Standards Act became law in 1938. Section 3(c) of the Act as then enacted, and as it still stands today, unamended and unchanged, defines the geographical coverage of the Act by including within the definition of the term State "any Territory or possession of the United States." At that time, in addition to the areas long known as territories and possessions, the United States operated under a lease, similar in many respects to that here involved, a naval base in Guantanamo Bay, Cuba, which, as we show, *infra*, pp. 22-25, has never been considered a possession of the United States.

The question raised by the present case is not whether Congress had the power to extend the coverage of the Fair Labor Standards Act to employees' activities at these bases. The issue is whether Congress intended the Act to apply to the various areas outside the continental limits of the United States, leased after the passage of the Act as military bases from various foreign governments.

The court below held that the Bermuda bases were "possessions of the United States."[1] This

[1] No contention has been advanced at any time that these bases are territories of the United States. It has long been established that the term "Territory of the United States"

holding appears to have been based both on the theory that the phrase "possessions of the United States" had a special meaning for the purposes of the Fair Labor Standards Act, and hence encompassed the leased bases (see *Eckert* v. *Elmhurst Contracting Co.*, 185 Misc. 108 (City Ct. N.Y., N.Y. Cty.) affirmed, 186 Misc. 100 (S. Ct. App. Term, 1st Dept.); *Crowe* v. *Elmhurst Contracting Co.*, 74 NYS (2d) 445 (Sup. Ct., N.Y. County), affirmed, 79 NYS (2d) 876 (App. Div. 1st Dept.), and on the theory that the leased bases were possessions of the United States in the ordinary sense, and hence covered by the Act (R. 68, 71-72).

The Government believes that neither theory is sound. In Point I, we will demonstrate that Congress used the phrase "possessions of the United States" in its normal sense, not in a sense special to the Act here involved. We will show in Point II that the bases leased from Great Britain are not possessions of the United States in that sense. In Point III, we will discuss the contention advanced by respondents for the first time in their brief in opposition, based on the definition of "commerce" in Section 3(b) of the Act.

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normally applies only to those territories which have been incorporated into the United States, and not to unincorporated territories. See *De Lima* v. *Bidwell*, 182 U. S. 1; *Dooley* v. *United States*, 182 U.S. 222; *Downes* v. *Bidwell*, 182 U.S. 244; *Balzac* v. *Porto Rico*, 258 U. S. 298; compare *Puerto Rico* v. *Shell Co.*, 302 U.S. 253. Only Alaska and Hawaii have been so incorporated into the United States and have been designated as Territories by Congress. See 37 Stat. 512, 48 U.S.C. 21; 31 Stat. 41, 48 U.S.C. 491.

I

The phrase "Possessions of the United States" in Section 3(c) of the Fair Labor Standards Act is used in its ordinary sense and not in a sense peculiar to that Act.

Congress has used the phrase "possessions of the United States" in a variety of statutes. This use has usually been in conjunction with "Territory," so that the phrase "Territory or possession of the United States" has become virtually a phrase of art by which Congress indicates that the specific legislation before it is to cover the various areas long known by that designation.

Thus Section 3 of the Federal Communications Act defines the "United States" for the purposes of that Act to mean the "several States and Territories, the District of Columbia, and the *possessions*[2] of the United States," and defines State to include "the District of Columbia and the Territories and *possessions*." Act of June 19, 1934, 48 Stat. 1064, 1065, 47 U.S.C. 153(g)(v). The Bank Conservation Act defines "State" as "any State, Territory or *possession* of the United States, and the Canal Zone." 48 Stat. 2, 12 U.S.C. 202. Section 2 of the Federal Employers' Liability Act provides that "Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other *possessions* of the United States shall be liable in damages * * *." 35 Stat. 65, 45 U.S.C. 52. Section 2 of the Surplus Property Act of 1944 defines

[2] Italics supplied unless otherwise noted

"State" to mean "the several States, territories, and *possessions* of the United States, and the District of Columbia". 50 U.S.C. App. 1612(i). For other examples, see Commodities Exchange Act, 7 U.S.C. 2; Packers and Stockyards Act, 7 U.S.C. 182(6); Federal Seed Act, 7 U.S.C. 1561(a)(3); Firearms Act, 15 U.S.C. 901(2), (7); Filled Milk Act, 21 U.S.C. 61(b); Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321(a); Air Commerce Act of 1926, 49 U.S.C. 171, 179(b); Civil Aeronautics Act, 49 U.S.C. 401 (20), (29) (31); 42 U.S.C. 201(g) and 39 U.S.C. 283, 654.[3]

Congress in using the phrase "Territory or possession of the United States" in Section 3(c) of the Fair Labor Standards Act used it, we submit, in the same sense as in these various statutes, in accordance with its long established practice.

A. THE LEGISLATIVE HISTORY OF THE ACT INDICATES THAT "POSSESSION OF THE UNITED STATES" WAS USED IN ITS ORDINARY SENSE.

The Act's legislative history, we submit, discloses that the Congress did not intend to expand the phrase "possession of the United States" beyond its ordinary meaning.

Section 2(a) of the fair labor standards bill passed by the Senate (S. 2475, 75th Cong., 1st sess.;

[3] The consistent use in these statutes of "possession" (uncapitalized) alongside of "Territory" (capitalized) set out in the text reveals, we submit, the inherent fallacy in the reasoning below that the omission to capitalize "possession" indicates a Congressional intention "to be as broadly inclusive as the simple definition of Webster's Dictionary * * *." (R. 69).

81 Cong. Rec. 7957) defined "State," in the form finally adopted, to include "any Territory or possession of the United States." See H. Rep. 2738, 75th Cong., 3d sess., p. 13; 82 Cong. Rec. 1573; 83 Cong. Rec. 9250. When the proposed legislation was in the House of Representatives, all of the Senate bill after the enacting clause was stricken and a bill entirely different in substance inserted. The definition of "State" finally proposed by the House was limited to the various States, the District of Columbia, and the Territories; it did not include "possession of the United States." See H. Rep. 2182, 75th Cong., 3d sess., p. 2; H. Rep. 2738, 75th Cong., 3d sess., p. 21. It was only after the managers on the part of both houses met in conference that the phrase "possession of the United States" appeared again. H. Rep. 2738, 75th Cong., 3d sess., p. 2. The fact that one House of Congress originally opposed extension of the Act to include the possessions strongly suggests that Congress did not intend "possession" to have a meaning broader than customary.

Nowhere in legislative history is there any reference to the meaning of this definitional phrase. See S. Rep. 884, 75th Cong., 1st sess., pp. 5-6; H. Rep. 1452, 75th Cong., 1st sess., pp. 11-12. Use of a well known term without discussion also indicates that Congress meant the term to have its ordinary meaning.

The absence of such discussion becomes even more significant in light of the fact that at that

time the United States was operating a Naval Base in Guantanamo Bay under lease from Cuba, under an arrangement very much like that involved here. That base has not been regarded as a territory or possession for other purposes. If Congress had intended it to be covered by the Fair Labor Standards Act, presumably the matter would have been mentioned.

B. THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION HAS INTERPRETED "TERRITORY OR POSSESSION OF THE UNITED STATES" AS HAVING ITS ORDINARY MEANING.

1. The Wage and Hour Division of the Department of Labor, charged with the administration and enforcement of the Fair Labor Standards Act has interpreted the phrase involved as being limited to those areas normally considered territories and possessions of the United States. Interpretative Bulletin No. 2, issued on October 17, 1938, shortly after the Act's enactment, reads as follows (Wage and Hour Manual (1942 Ed.) p. 30):

> * * * In Section 3(c) "State" is defined as meaning "any State of the United States, or the District of Columbia, or any Territory or possession of the United States."
>
> Therefore, employees within the District of Columbia, and the Territories and possessions (Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands)

> are dealt with on the same basis as employees working in any of the forty-eight States.

The Philippine Islands aside,[4] this enumeration of territories and possessions includes only areas long known as territories and possessions of the United States.

Although the particular bases here involved had not yet been leased to the United States at the time of the issuance of this Bulletin, the United States did at that time operate the Guantanamo Bay Naval Base under lease from Cuba. That base, although leased to the United States on terms which are in many respects broader in effect than the terms of the lease under which the United States acquired the bases here involved (see *infra*, pp. 22-25), was not included in the Wage and Hour Division's enumeration of "Territories or possessions of the United States." This accords with the omission of the Base from non-self-governing areas for which the United States is responsible as to which the State Department submitted information to the United Nations (*infra*, pp. 24, 37), and with the ruling of the Attorney General that the Base was not a "possession" of the United States within the meaning of the Tariff Act of 1922 (42 Stat. 858, 19 U.S.C. 121); 35 Op. Atty. Gen. 536, see *infra*, p. 24.

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[4] Section 5 of the Act of August 19, 1916, 39 Stat. 545, 547 provides: "The statutory laws of the United States hereafter enacted shall not apply to the Philippine Islands, except when they specifically so provide, or it is so provided in this Act."

Inasmuch as the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C., Supp. I, 251, contemplates that interpretations of the Administrator of the Wage and Hour Division should in certain circumstances be controlling in determining rights and liabilities in the courts, the Administrator in 1947 reexamined various of his interpretations to determine whether they then correctly interpreted the law in the light of developments since their issuance. See 12 F.R. 4583; 29 C.F.R., 1947 Supp., Sec. 776. Among the interpretations reexamined was that relating to the meaning of the phrase "Territories or possessions of the United States." Although the United States had by that time acquired the leased bases here involved, the provisions of Interpretative Bulletin No. 2, *supra*, were reissued in the original form; they continued to list as included Territories and possessions only "Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands." 12 F.R. 4583-4584; 29 C.F.R., 1947 Supp., Sec. 776.1 par. 24, 102.01(c).

3. In its responses to inquiries from the public whether employment at the bases leased from Great Britain or other foreign countries was covered by the Fair Labor Standards Act, the Wage and Hour Division has interpreted the phrase here involved as limited to possessions of the United States in the ordinary sense. Indeed, until at least 1944, the Division ruled specifically that these bases were not

"possessions of the United States" and hence that employment there was not covered. The Administrator in a letter of May 22, 1942 (Appendix B, *infra*, p. 55), interpreted the Act as not covering employment at the leased base in the British West Indies, and in letters of October 21, 1942 (Appendix B, *infra*, p. 56), and September 24, 1943 (Appendix B, *infra*, p. 55), the Wage and Hour Division again interpreted the Act as excluding employment at the leased base in Trinidad.

Subsequently, however, he has declined to pass on the question. He stated (R. 56) that the "State Department officials who were consulted * * * indicated that thus far the United States Government has not made any claim that the base secured from the British are possessions of this country and that the State Department has not made any ruling or issued any interpretations pertaining to the matter." He accordingly deferred determination of the status of these leased lands to "court decisions, congressional or executive acts, or interpretations issued by the State Department or other proper governmental agencies." In so declining to pass on the question, the Administrator plainly contemplated that the question of the status of the leased areas would not be determined with particular reference to the Fair Labor Standards Act but rather would be a determination as to status generally, i.e. whether these bases were possessions of the United States in the ordinary sense.

II

The Bermuda bases are not possessions of the United States [5]

A. THE LEASING OF THE BASES DOES NOT INVOLVE THE TRANSFER OF SOVEREIGNTY ESSENTIAL TO THESE AREAS BECOMING POSSESSIONS OF THE UNITED STATES.

1. *Right of sovereignty over area is essential to area's being "possession of the United States."* (i) *The possessions generally.* The various international law authorities are unanimous in defining acquisition of territory in terms of a transfer of sovereignty to the acquiring nation. I Lauterpacht, *Oppenheim's International Law* (5th Ed. 1937) pp. 430, 431; I Hackworth, *Digest of International Law*, p. 421; Hyde, *International Law* (2d Ed. 1945) p. 358. In all instances in which this country has acquired land treated as a possession a transfer of sovereignty was clearly involved. See 8 Stat. 200, 202 (acquisition of Louisiana Territory from France); *Delassus* v. *United States*, 9 Pet. 117, 133; *Strother* v. *Lucas*, 12 Pet. 410, 435-436; 8 Stat. 252, 254 (acquisition of Florida from Spain); cf. *United States* v. *Percheman*, 7 Pet. 51, 86-88; 15 Stat. 539 (Alaska); 30 Stat. 750 (Ha-

[5] The determination whether the Bermuda bases are "possessions of the United States" in the ordinary sense has significance not only for resolving the question of coverage under the Fair Labor Standards Act but in addition will determine the applicability of numerous other statutes applying to possessions of the United States, some of which we have listed, *supra*, pp. 11-12. See also petitioner's brief, p. 45.

waii); *Hawaii* v. *Mankichi*, 190 U. S. 197; 39 Stat. 1706 (Danish West Indies); 31 Stat. 1878, 1879; 45 Stat. 1253 (Tutuila, Manua and other Eastern Samoan Islands); 30 Stat. 1754, 1755 (Puerto Rico, Guam and the Philippine Islands).[6]

Such a transfer of sovereignty has been an essential ingredient of the acquisition not only where the area involved is incorporated into the United

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[6] The status of the Panama Canal Zone is anomalous. This Court after reviewing the terms of the treaty (33 Stat. 2234-2235) commented "it is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate." *Wilson* v. *Shaw*, 204 U. S. 24, at 33. However, the view that the Canal Zone is a possession of the United States has not been universally accepted. *Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173, 177. And there have been instances when Congress specifically provided that for particular purposes the Canal Zone should be treated as a territory or possession of the United States. See *Luckenbach S. S. Co.* v. *United States*, *supra*, at 180; cf. 40 Op. Atty. Gen. No. 10 (April 16, 1941). Moreover, when the Department of State in 1946 included the Canal Zone among the non-self-governing territories on which reports were filed with United Nations (see *United Nations, Non-Self-Governing Territories, Summaries of Information Transmitted to the Secretary General during 1946* (U. N. Publications (1947); p. 101), the Panamanian Delegation voiced objection, arguing that sovereignty over the Canal Zone resides in the Republic of Panama. *The United States and Non-Self-Governing Territories* (GPO 1947), p. 21, n. 1. In view of this statement, the Department of State did not transmit such information in 1947, "pending clarification of this question with the Republic of Panama." *Summary of Information transmitted by the Government of the United States of America* (U. N. Release A/320, 25 July 1947), p. 1. See also 2 Hackworth, *Digest of International Law*, pp. 172-173 (exchange of notes between United States and Panama when Supreme Court of Justice of Panama took position that its jurisdiction might be extended to cases arising within the Canal Zone and involving residents therein).

States as a state or territory but also, as this Court has recognized, where the area is not incorporated into the United States and becomes a "possession." In describing the relation of this country to Puerto Rico, Guam and the Philippine Islands—areas acquired by the Treaty of Paris with Spain,[7] and which became "possessions" and not territories of the United States—this Court stated that these areas "came under the complete and absolute sovereignty and dominion of the United States." See *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 179. The Philippines, for example, although not "incorporated into" the United States, were held "under the sovereignty of the United States as a possession or dependency." See *Rassmussen* v. *United States*, 197 U. S. 516, 521. They "constituted a dependency, for they were not possessions merely, but possessions held by right of cession from Spain and over which the United States undoubtedly had supreme power of legislation and government. See *United States* v. *The Nancy*, 3 Wash. C. C. 281, 286, *et seq.*" *Posadas* v. *National City Bank*, 296 U. S. 497, 502; *Cincinnati*

[7] By the same treaty, Spain relinquished "all claim of sovereignty over and title to Cuba." But the obligations assumed by the United States in respect to Cuba were only for "so long as such occupation shall last." (30 Stat. at 1755). It is established that during this period of occupancy, Cuba remained none the less "foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U. S. 109, 119; *Galban & Co.* v. *United States*, 40 C. Cls. 495, affirmed *per curiam*, 207 U. S. 579.

Soap Co. v. *United States*, 301 U. S. 308, 314; *Domenech* v. *National City Bank*, 294 U. S. 199, 204; *Galban & Co.* v. *United States*, 40 C. Cls. 495, 506-507, affirmed *per curiam*, 207 U. S. 579; cf. 34 Op. Atty. Gen. 287. In *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, this Court said in regard to the areas acquired from Spain by the Treaty of Paris (324 U. S. at 673):

> That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of, the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax* Cases in 1901; *De Lima* v. *Bidwell*, *supra* [182 U. S. 1]; *Dooley* v. *United States*, *supra*, 182 U. S. 222; *Downes* v. *Bidwell*, 182 U. S. 244; *Dooley* v. *United States*, 183 U. S. 151; and see also *Public Utility Commissioners* v. *Ynchausti & Co.*, 251 U. S. 401, 406-407; *Balzac* v. *Porto Rico*, *supra* [258 U. S. 298]. This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions.

And Mr. Justice Reed, dissenting, stated (*ibid.* at 681-683):

> Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into ces-

sion, lands lose their foreign character and become a part of the territories of the victor.[8]

(ii) *Guantanamo Naval Base:* In contrast to the above examples of transfer of sovereignty whereby the area involved became a territory or possession of the United States, the acquisition of the Naval Base in Guantanamo Bay, Cuba, under a lease vesting substantially broader rights in the United States than was granted by the lease here involved, clearly did not transfer any sovereignty, and consequently, that area has never been regarded as a possession of the United States. It was acquired pursuant to the condition imposed by the Act of March 2, 1901 (31 Stat. 895), that "to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points." 31 Stat. at 898. A lease "subject to terms to be agreed upon by the two Governments" was concluded on February 16 and 23, 1903 (1 Malloy, *Treaties* (1910), pp. 358-359), providing that Cuba "hereby leases to the United States, for the time required for the purposes of coaling and naval stations," certain de-

[8] In this connection, it may be noted that Section 101(e) of the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. 501(e), defines "outlying possessions" in terms of "territory • • • over which the United States exercises rights of sovereignty • • •"

scribed areas of land and water in the Bays of Guantanamo and Bahia Honda. Article I. This includes "the right to use and occupy the [adjacent] waters * * * to improve and deepen the entrances thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose. Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant." Article II. Article III provided: "While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas * * *."

Subsequently, the two Governments entered into an agreement "to conclude the conditions of the lease." Agreement of July 2, 1903, 1 Malloy, *Treaties* (1910), pp. 360-361. Article III of the conclusion agreement provided: "No person, partnership, or corporation shall be permitted to establish or maintain a commercial, industrial or other enterprise" in the areas. The parties further agreed to the delivery to each other of fugitives from justice charged with crimes amenable to

Cuban or American law respectively who are taking refuge in their respective areas. Article IV. No customs duties were to be levied on materials of any kind imported into the areas "for exclusive use and consumption therein." No such materials were to be transported from the areas "into Cuban territory." Article V.

In passing on the question whether, in light of these provisions of the lease and agreement, goods imported into the naval station are subject to tariff duties levied under the Tariff Act of 1922 (42 Stat. 858, 19 U. S. C. 121) "upon all articles when imported from any foreign country into the United States or into any of its possessions * * *," the Attorney General ruled that the area was not a possession of the United States, at least as the word is used in the tariff laws, but only a "place subject to the use, occupation and control of the United States for a particular purpose" in view of "the nature of the station, as a mere governmental outpost beyond our borders, without inhabitants other than as indicated, closed to ordinary commerce, and into which no person or thing may enter without permission." 35 Op. Atty. Gen. 536, 540-541.

The view that the Guantanamo Naval Base is not a possession of the United States has been uniformly accepted as of general applicability. The base was not included in the list of United States' "non-self-governing territories" submitted by the Department of State to the United Nations in 1946

or 1947. *Infra*, p. 37. It is not included in the Wage-Hour Administrator's enumerations of "possessions" under the Fair Labor Standards Act. *Supra*, pp. 14-16. Nor, as far as we are aware, has it been included in any other administrative or statutory enumeration of "possession" of the United States, other than in the Defense Base Act, where it was expressly included in the definition of possession, in order to achieve the comprehensive coverage of that Act. See Pet. Br. p. 38, fn. 9.

Dr. George Grafton Wilson in commenting on the status of the Naval Station, as one phase of the international problem of the status of leased areas, points out that the "United States acquired 'complete jurisdiction' of certain areas in Cuba for naval bases but recognized 'the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water,' which 'are therefore *leased* to the United States and not *ceded*'." (Italics in original). Dr. Wilson continues: "Sometimes the distinction between transfer of sovereignty and a lease by international convention differs little in actual operation, but, as the Japanese claimed in 1900, 'sovereignty is too important a matter to pass thus with a lease'." Wilson, *Leased Territories*, 34 Am. J. of International Law 703, 704.

2. *No transfer of sovereignty is involved in the leasing of the Bermuda bases:* Both the negotiations preceding execution of the Agreement by

which Great Britain leased the Bermuda bases to the United States, and the Executive Agreement itself, reveal beyond any doubt that neither the United States nor Great Britain intended that sovereignty over the areas leased be transferred from Great Britain to the United States. Consequently, we believe that the leased areas, instead of becoming possessions of the United States are as is the Guantanamo Naval Base, "mere governmental outpost[s]," "place[s] subject to the use, occupation and control of the United States for a particular purpose." Cf 35 Op. Atty. Gen. 536, 540-541.

(i) *The Negotiations:* Prior to the negotiations of the formal detailed Agreement and Leases, there was on September 2, 1940 an Exchange of Notes between Great Britain and United States setting out the general agreement of the two nations. 55 Stat. 1560, 1572-1573, *Executive Agreement Series 235, Leased Naval and Air Bases,* pp. 14-15. As the British note formulated it, Great Britain was to "secure the grant to the Government of the United States * * * of the lease for immediate establishment and use of Naval and Air bases and facilities * * *" on specified British territories. 55 Stat. at 1572. The members of the British Government in discussing in Parliament this phase of the proposed transaction [9] made it clear that there was no transfer of sovereignty intended. The Prime

[9] The exchange of notes also provided for the transfer to Great Britain of 50 over-age destroyers.

Minister reporting to the House of Commons stated explicitly: "* * * there is, of course, no question of any transference of sovereignty—that has never been suggested * * *." 364 *Parliamentary Debates, House of Commons,* 1170-1171. And the Secretary of State for Foreign Affairs advised the House of Lords that "No question of any transference of sovereignty arises." 117 *Parliamentary Debates, House of Lords,* 367.

Those in charge for the United States likewise considered the transaction purely a lease arrangement without any cession of territory or transfer of sovereignty. President Roosevelt's message to Congress on September 3, 1940, making public the exchange of notes stated only that the United States had "acquired the right to lease naval and air bases" at enumerated British Empire points in the Western Hemisphere. H. Doc. 943, 76th Cong., 3rd sess., p. 1. The Attorney General's opinion transmitted therewith indicated that "the privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use with the sovereignty retained by Great Britain," *id.* at p. 5, 39 Op. Atty. Gen. 484, 485, *infra,* pp. 34-36; see also 1 Hull, *Memoirs* (1948), p. 834. The members of the United States Commission, who negotiated the Agreement and the Leases, were keenly aware of the limited purpose and character of the arrangements and conducted their dealings on that basis. See Hearings on H. R. 5096, House Committee on the Judiciary, 77th Cong., 1st sess., tr. 22-23 (testimony of Assistant Solicitor General

Fahy who had served as civilian representative on the Commission); Winant, *Letters from Grosvenor Square* (1948), pp. 33-38. On the issue of sovereignty the members of the United States Commission "never departed from the positions that the heads of the two governments had taken," namely, that "sovereignty was not transferred." Hearings on H. R. 5096, *supra*, tr. 25.

(ii) *The Leases and the Agreement:*[10] In contrast to the various treaties by which land was ceded to the United States by explicit transfer of sovereignty, the lease document for the Bermuda area provides that His Majesty, the King, "doth * * * demise * * * all that property * * * to hold unto the United States of America for a term of ninety-nine years * * * for the purposes specified in the * * * Notes." The United States was not to "use the said property or permit the use thereof, except for the purposes specified in the * * * Notes and Agreement." 55 Stat. 1576, 1577; *Executive Agreement Series 235, supra*, p. 20.[11] Cf. Wilson, *Leased Territories, supra.*

[10] There was a separate lease executed for each of the areas leased to the United States. The Agreement, on the other hand, was a single document pertaining to all areas involved.

[11] The leases of the various other bases involved in the Exchange of Notes and the Agreement follow the same pattern, except that in some cases, the lessee is not the King, but the Governor-General of territory in which the particular area is located. 55 Stat. 1574-1589; *Executive Agreement Series, 235*, pp. 17-34.

In dealing with the Agreement, the court below attempted to summarize various of the rights and privileges granted thereby which, the court considered, indicated that the United States had acquired a possession (R. 67-68), but in so doing, the court omitted several significant limitations even as to these rights and privileges. For instance, the court emphasized the broad authority granted to the United States by Articles I (General Description of Powers) and II (Special Emergency Powers), but these rights and privileges were necessarily limited by the subsequent specific provisions which illustrate the restricted nature of the grant. Moreover, the United States is not given by Article IV(i) an unqualified "absolute right" over the offenses enumerated therein, as suggested by the court below (R. 67), but only an absolute right "in the first instance" to assume and exercise jurisdiction with respect to such offenses. As stated in the Department of State's letter (Appendix A, *infra*, pp. 49-54), the jurisdiction conferred by that Article is limited. It is not confined to the leased areas but extends in some aspects also to the whole territory in which the base is situated. Similarly, the permission to establish postal facilities in the leased areas is not unlimited, as suggested below (R. 67-68), but restricted to "exclusive use of the United States forces, and civilian personnel * * * who are nationals of the United States and employed in connection with the construction,

maintenance, operation or defence of the Bases, and the families of such persons, for domestic use." Article XVI.[12] Nor is the suspension of the immigration laws of the Territory in regard to the leased areas unlimited (R. 67); these laws were suspended only to admit American military forces or personnel in connection with the construction, maintenance, operation or defense of the base, and the United States is responsible for providing passage out of the Territory for any such person no longer entitled to admission. Article XIII. The exemption from local income and poll taxes provided in Article XVII extends only to members of the United States forces and nationals of the United States employed in connection with the bases and does not include income derived from the Territory. Thus, the rights and privileges granted by the Agreement are not as broad as the court below indicated, a factor which, we submit, substantially impairs the soundness of its reasoning.

Moreover, as pointed out by the State Department, all these factors, taken together, are not sufficient to justify the conclusion below, for "during the war the United States has been granted

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[12] An annex to the Agreement more sharply delineated the limitations on the right to establish postal facilities. "The use of these Post Offices will be strictly limited to persons entitled under Article XVI to use them, and any mail deposited in such a Post Office which may be found by the United States examiners to be from a person not entitled to use it will, if required, be made available to the authorities of the Territory for examination." *Executive Agreement Series No. 235*, p. 41.

exclusive jurisdiction over offenses committed by members of its armed forces stationed in many foreign countries; likewise exemptions from immigration laws, permission to establish postal facilities, exemption from income and other taxes, have been or are enjoyed by members of the armed forces of the United States and other governmental personnel in many foreign countries without any suggestion that by the grant of such rights and privileges the foreign sovereign concerned has surrendered its sovereignty or bargained away its possessions." Appendix A, pp. 51-52.

The court below placed considerable stress on the "interesting negative provision" (R. 68), that "it is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." Article XI(4). But the lease with Cuba for the Guantanamo Naval Base contains a similar provision, assuring free passage through the waters included in the grant to vessels engaged in the Cuban trade. *Supra*, p. 23. Yet, this provision has not been deemed sufficient to convert the Guantanamo Naval Base into a possession of the United States.[13] Thus, the provisions of the Agreement principally relied on by the

[13] In any case, this provision alone would not be sufficient to justify the conclusion below, in face of the various other limitations imposed by the Agreement on the use by the United States of the leased areas.

court below not only do not indicate that the areas involved in the leases were possessions of the United States, but rather demonstrate that the tenure of the United States is that of a mere lessee.

The court below also failed to give any weight to several additional provisions which likewise demonstrate that no transfer of sovereignty was involved and that the United States was a mere lessee. Article XVIII prohibits the establishment of business enterprises (except post exchanges) in the leased areas and enjoins any person from "habitually render[ing] any professional services in a Leased Area, except to, or for, the Government of the United States and the persons" connected with the base. Article XIV provides for the lifting of customs and other duties only for limited purposes and limited personnel, and prohibits the resale of goods so admitted except through post exchanges. Article XI(5) prescribes the operation of commercial aircraft except "for strictly military purposes," and Article XV provides "except with the consent of the Government of the Territory, no wireless station shall be established or submarine cable landed in a Leased Area otherwise than for military purposes." Article XXIII forbids the United States to "assign or underlet or part with the possession of the whole or any part of any Leased Area, or of any right, power or authority granted by the Leases or * * * [the] Agreement." Article XXV excludes from

the rights granted to the United States, all minerals (including oil), antiquities and treasure found on the leased areas. Article XXIX in effect provides that all laws of the Territory except those "which would derogate from or prejudice any of the rights conferred on the United States" are to be applicable in the leased area.

Those provisions, spelling out in detail a grant much more restricted than that involved in the lease of Guantanamo Naval Base (see *supra*, pp. 22-24), demonstrate clearly the limited nature of the grant involved in the Agreement, a grant which, we submit, not only does not transfer sovereignty over the leased areas to the United States but falls far short of subjecting these areas "to fully as complete control by the United States as obtains in other areas long known as 'possessions' of the United States" (R. 68).

B. THE EXECUTIVE DEPARTMENT HAS DETERMINED THAT THE BERMUDA BASE IS NOT A POSSESSION OF THE UNITED STATES

So far we have dealt with the question involved as if it were a purely "private controversy" to resolve an "issue between two groups of private parties" (R. 69, 70). In fact, the controversy is political in nature, affecting our relations with Great Britain and potentially other foreign countries which have leased bases to the United States on similar terms and conditions. See Pet. Br., pp. 45-52. In such matters, the views of the Executive

Department, as well as those of Congress, are entitled to great, if not conclusive, weight. This Court has long recognized that "who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Jones* v. *United States*, 137 U. S. 202, 212, and cases there cited; *Pearcy* v. *Stranahan*, 205 U. S. 257, 265; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-322. And the Executive Department of the Government has determined that the United States is not sovereign over the leased areas, and that these areas are not possessions of the United States.

1. Attorney General Jackson, in considering the power of the President to acquire these bases from the British Government by Executive Agreement as against a treaty subject to ratification of the Senate, summarized the proposed agreement as follows (39 Op. Atty. Gen. 484, 485):

> The acquisition consists only of rights, which the United States may exercise or not at its option, and if exercised may abandon without consent. The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States' use with the sovereignty retained by Great Britain. Our Government assumes no responsibility for civil ad-

> ministration of any territory. It makes no promise to erect structures, or maintain forces at any point. It undertakes no defense of the possessions of any country. In short it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance.

And in advising the President that the bases could be acquired by Executive Agreement, the Attorney General stated (at 487, 488):

> The proposition falls far short in magnitude of the acquisition by President Jefferson of the Louisiana Territory * * *. * * * the precedents perhaps most nearly in point are the numerous acquisitions of rights in foreign countries for sites of diplomatic and consular establishments—perhaps also the trade agreements recently negotiated under statutory authority and the acquisition in 1903 of the coaling and naval stations and rights in Cuba * * *.

The opinion plainly did not visualize the proposed lease of the Bermuda bases as involving the acquisition of territory or the transfer of sovereignty over areas involved to the United States, which transfer, we have shown *supra*, pp. 18-22, is a *sine qua non* to the cession of territory by one Nation to another. The Attorney General's statement that the maintaining of the bases is subject only to "limitations necessary to reconcile United

States' use with the sovereignty retained by Great Britain," recognizes that the sovereignty over the leased bases was retained by Great Britain, and not transferred to the United States. This statement accords with the subsequent proposition that the leases "fall far short in magnitude" of the Louisiana purchase involving the cession of that territory by France to the United States and with the analogy to the acquisition of sites in foreign countries for diplomatic and consular establishments and of the Guantanamo Naval Base in Cuba. There has never been any question that the sites of diplomatic and consular establishments in foreign countries are not possessions of the United States. Similarly, the Guantanamo Naval Base has never been considered a possession of the United States in the ordinary sense. See, *supra*, pp. 22-25.

2. There was before the court below a letter from the State Department stating that "this Government has not made any claim that the bases in Bermuda are territories or possessions of the United States" (R. 17). The court, however, refused to give any weight thereto on the ground that that letter went on to say, "there would therefore appear to be no reason for any ruling or opinion on the matter." This the court construed to negative any suggestion that the Executive Department had determined the issue (R. 71). While this case was pending on petition for certiorari, the Department of State addressed a letter to the Attorney General

dispelling any doubt as to its view on the matter. In this letter, the Department of State, after summarizing the various provisions of the lease, concluded (Appendix A, p. 53):

> The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States. The leased areas are to be held by the United States for the stated period for certain specified uses of a military nature, and the United States is not free to use them as it would its own property * * *. The restrictions placed on use of the bases by the United States and the term of the lease are inconsistent with the conception of "possessions" of the United States as applied to the areas mentioned in the Court's opinion.

The position of the Department of State that the leased bases are not possessions of the United States is reflected in its annual reports to the United Nations. Under Article 73(e) of the United Nations Charter (59 Stat. 1033, 1048), the United States is required to submit information about "non-self-governing territories" for which the United States is responsible. In so doing, the United States has not reported as to any leased base area, although information has been submitted in regard to "all of the territories and island possessions" under American "administration" except "certain minor island possessions" which are un-

inhabited or sparsely settled, such as Wake, Midway and some of the Guano islands. See, *United Nations, Non-Self-Governing Territories* (UN Publication (1947), pp. 134, 101-129).

The letter from the State Department further declares (*infra*, pp. 52-53):

> The Department regards as unfortunate the conclusion of the Court that the U. S. exercises as complete control in the leased areas as in other areas long known as "possessions" of the U. S., * * *.
>
> Any holding that the bases obtained from the Government of Great Britain on 99 year leases are "possessions" of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought. The Department is not clear that the Court has so decided in the case under reference, but it feels that the matter is not free from doubt and in view of the possible implications that it should not be left in that state.

The significance of these remarks is obvious.

C. CONGRESS LIKEWISE HAS NOT REGARDED THE LEASED AREAS AS POSSESSIONS OF THE UNITED STATES

Since the acquisition of the leased bases, Congress has enacted legislation from which it is clear

that the Congress did not regard the leased bases as possessions of the United States.

War Damage Corporation: The War Damage Corporation was created by the Reconstruction Finance Corporation on December 13, 1941, and initially protected against loss only property located on continental United States. S. Rep. 1012, 77th Cong., 2d sess., pp. 2-3; 88 Cong. Rec. 965. On December 22, 1941, the protection was extended to property in Alaska, Hawaii, Puerto Rico and the Virgin and Philippine Islands. S. Rep. 1012, 77th Cong., 2d sess., p. 3; 88 Cong. Rec. 965. Thereafter, bills to confirm this action were introduced, limiting insurance protection "to property situated in the United States, including the several States, the District of Columbia, Alaska, Hawaii, Puerto Rico, and the Virgin and Philippine Islands." H. R. 6382, S. 2198, 77th Cong., 2d sess.

The law as enacted, however, authorized the War Damage Corporation to insure against loss "property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States." Act of March 27, 1942, 56 Stat. 174, 176. In response to a question as to what was contemplated by the "additional coverage" of the clause

"in such other places, * * *" as it appeared in the bill, a member of the House Committee on Banking and Currency, to which the proposed legislation had been referred, stated without correction (88 Cong. Rec. 1851):

> As I recall—and I can be corrected by my colleagues if I do not state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States wherein there may be private property connected with them.

The inclusion of language, in addition to the phrase "Territory or possession of the United States," in order to cover such bases indicates that Congress did not consider the bases leased from various foreign countries as possessions of the United States.

III

The Fair Labor Standards Act Does Not Cover Employees engaged in "Commerce" outside the United States, its Territories and Possessions.

Respondents in their brief in opposition suggest that the question whether the Bermuda bases are possessions of the United States is not the controlling factor in this case, and advance an alternative independent ground in support of the judgment below. Their contention appears to be that since part of their duties as patrolmen and firemen at the Bermuda bases allegedly involved the guarding and protecting of goods moving into and through the leased areas from the United States, such ac-

tivities performed in these areas fall within that part of the definition of "commerce" which reads "trade * * * from any State to any place outside thereof." Accordingly, respondents argue, the Act embraces their activities and they are entitled to its benefits (Br. in Opp., pp. 5-6).

1. This literal reading of the definition would bring within the Act persons in foreign countries who transport and unload goods shipped from the United States. Assuming, *arguendo*, that respondents' duties required them to guard and protect goods moving into and through the leased area from the United States,[14] it does not follow that such activities alone, although falling within the literal definition of "commerce," are sufficient for coverage under the Act. Not only must the activities be in "commerce" but, in addition, we submit, the place of the performance of these activities must be in an area included within the geographic scope of the Act.[15] And although the Act contains no express delineation of its geographic coverage, we believe that Congress intended the areas included within the definition of "State," set out

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[14] It has not been established or found that respondents' duties required them to guard and protect goods moving into and through the leased area. That issue is a factual one to be passed on by the District Court. The question was involved in one of the grounds on which petitioners moved for summary judgment (R. 60) and on which the District Court expressly took no action (R. 62).

[15] We do not mean to suggest that the Act might not apply to seamen in American vessels on the high seas if they were not expressly exempted by section 13 (a) (3).

immediately following the definition of "commerce," to mark out the Act's geographic limitations. Cf. *Burns* v. *Metcalfe Const. Co.*, 69 F. Supp. 381 (W. D. Mo.); *Bernhard* v. *Metcalfe Const. Co.*, 64 F. Supp. 953 (D. Neb.); *Filardo* v. *Foley Bros., Inc.*, 181 Misc. 136 (Sup. Ct. N. Y. County). As so limited, activities to be covered by the Act must for present purposes not only be in commerce but must also be performed in a State, the District of Columbia, or a Territory or possession of the United States. As so limited, the Act would have no extra-territorial application.

The phrase "to any place outside thereof" in the definition of "commerce," on which respondents' claim in this phase of the case is predicated, was included, we submit, for the purpose of making it clear that employees located in a "State" and engaged in producing goods for export or participating in the exportation itself were to receive the benefits of the legislation. If the definition of commerce included only trade between the States, a factory in a port city such as New York or Boston, producing goods for direct shipment from that port to a foreign country, or a longshoreman on the docks of these ports loading such goods on board ship, would not be covered by the Act. It was to avoid such a result, and not to extend the coverage of the Act extra-territorially, that "trade * * * from any State to any place outside thereof" was made part of the definition of "commerce."

This view accords with the usual canons of construction that "all legislation is *prima facie* territorial" (*American Banana Company* v. *United Fruit Company*, 213 U. S. 347, 357; *Ex Parte Blain*, 12 Ch. Div. 522, 528 (1879); *State* v. *Carter*, 27 N. J. (3 Dutcher) 499), and that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States," particularly where, as here, criminal penalties are involved. *Blackmer* v. *United States*, 284 U. S. 421, 437; see, also, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *United States* v. *Flores*, 289 U. S. 137, 155.

Moreover, although it is a well settled principle of construction that the meaning of the legislature is to be determined, if possible, from the language of an act, it is equally well established that a statute should be construed with reference to the purpose to be accomplished and the mischief to be corrected. *United States* v. *Carbone*, 327 U. S. 633, 637-639; *Chatwin* v. *United States*, 326 U. S. 455; *Smith* v. *Townsend*, 148 U. S. 490, 494; *Holy Trinity Church* v. *United States*, 143 U. S. 457. The purpose to be achieved and the mischief to be corrected by the Fair Labor Standards Act related to domestic and not foreign, conditions of employment. The President recommended the enactment of fair labor standards legislation primarily to improve domestic conditions of employment and to

increase purchasing power of employees. 81 Cong. Rec. 4960; H. Doc. 255, 75th Cong., 1st sess., p. 1. For that purpose, he proposed "that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade." 81 Cong. Rec. 4961. The Fair Labor Standards Act was enacted pursuant to this Presidential recommendation, and Congress' consideration of fair labor standards legislation was directed solely at the improvement of domestic conditions of employment. This is apparent from the extensive Hearings, the discussion of the proposed legislation on the floors of both Houses of Congress, and the graphic "Congressional finding and declaration of policy" set out in Section 2 of the Act. The only concern that Congress at any time manifested in regard to foreign trade was with respect to the increase of imports into the United States, which some members of Congress anticipated would result from the setting of minimum wages and maximum hours in the United States. See Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor, on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 77, 113, 134-135, 208, 257, 287, 302-303, 354-355, 375, 417-420, 509, 814; 81 Cong. Rec. 7921-7925.

In addition, the formulation of the definition of commerce in the Act, as finally passed, covers, not trade "between" any State and any place outside thereof as in the case of other statutes (See Pet. Br. p. 56), but rather "trade * * * from any State to any place outside thereof." Consequently, the Wage-Hour Administrator has construed the Act not to cover the employees of American employers within the State of importation who import goods from abroad, provided that the employees work within the State of importation exclusively on goods consumed within that State. See *Official Answers to Questions*, issued by the Administrator of the Wage-Hour Division in Wage and Hour Manual (Cum. Ed. 1944-1945), p. 116. Obviously, Congress, in denying the benefits of the Act to such employees of importers working in the United States, did not intend simultaneously to bestow its benefits on employees of importers working in a foreign country.

Furthermore, despite the fact that its objective in passing the Act was to improve domestic conditions of employment, Congress nevertheless "did not intend [in that Act] that the regulation of hours and wages should extend to the furthest reaches of federal authority." *McLeod* v. *Threlkeld*, 319 U. S. 491, 493. "In enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce." *10 E. 40th St. Co.*

v. *Callus*, 325 U. S. 578, 579; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 521-523; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 569-571. Nor has Congress exhausted its plenary power over the various territories and possessions. Although Congress had the power to reach all wages and hours in such areas, in them as well as in the states the Act only applies to employees engaged in commerce or in producing goods for commerce. Inasmuch as in these several respects the Act does not go to the constitutional limits of congressional power, it clearly does not follow that because Congress had authority to reach transactions in the leased areas it intended to do so.

2. Respondents seek to avoid the full logical consequences of their argument based on the literal language of the definition, which would apply to persons in foreign countries as well as in the leased areas, by urging that the phrase "to any place outside thereof" should be construed to reach only places "where the federal government controls the flow of commerce" (Br. in Opp., pp. 5-6). The suggested restriction reads into the Act words not only which Congress did not place there (cf. *Hilton* v. *Sullivan*, 334 U. S. 323; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617-618), but which, it is clear, Congress did not intend should be so included. This would extend the statute to areas not described in the following clause, which enumerates those places which are generally subjected to federal regulatory legislation. All of the con-

sideration heretofore advanced in this brief indicate that Congress did not intend any such limitation to be read into the Act.

Furthermore, if respondents' suggested restrictions were regarded as generally applicable to the definition of "any place outside thereof", the awkward result would be not to expand, but rather substantially to limit, the definition of "commerce." While it is true that it would extend the coverage of the Act to persons in respondents' position, it would also have the drastic consequence of excluding from coverage many employees working in the United States. The phrase "to any place outside thereof" does not stand alone; it is inseparably connected with the preceding phrase "trade * * * from any State * * *" and both phrases together express a single idea. Hence, respondents' suggested limitation on "to any place outside thereof" would operate to limit the entire concept involved, with the result that employees engaged in producing goods for commerce or engaged in commerce from any State to any place outside thereof which is not subject to Federal control, would be excluded from the definition of commerce. The export trade of this country to the areas subject to Federal control is infinitesimal, compared to our exports to other areas; accordingly, if respondents' suggestion were adopted, most, if not virtually all, employees engaged in producing goods for export, or in the exportation itself, would be denied the benefits of the Act.

Such a result is not only contrary to the purpose of Congress but also contrary to its intent as manifested in the language of the Act itself. The phrase "any place" in the definition of commerce is the broadest possible phrase that could be used; it is broader, for example, than the terms "foreign country" or "foreign nation" used in Section 4 of the Federal Trade Commission Act (38 Stat. 717, 719, 15 U.S.C. 44) and in Section 2(6) of the National Labor Relations Act, 49 Stat. 449, 450, 29 U.S.C. 152(6); cf. *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652. In deliberately using that phrase, Congress, we submit, clearly indicated an intention to provide the maximum coverage on the domestic phase of the export trade. The limitation suggested by respondents would effectively defeat this Congressional intention.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should accordingly be reversed.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
ROBERT L. STERN,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

OCTOBER 1948

APPENDIX A

DEPARTMENT OF STATE,
Washington, January 30, 1948.
[In reply refer to Le/M]

The Hon. TOM CLARK,
Attorney General.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to Mr. Peyton Ford's letter of January 2, 1948, calling attention to the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *John Joseph Connell et al.* v. *Vermilya-Brown Company, Inc., et al.* in which it was held that the defense bases in Bermuda are possessions of the United States within the meaning of the Fair Labor Standards Act of 1938. A copy of the opinion was enclosed and an expression of the Department's views concerning the correctness and desirability of the holding were requested in view of the possible implications of the decision from the standpoint of the international relations of the United States.

In arriving at its decision the Court pointed out that under the Leased Bases Agreement of March 27, 1941, the United States is given broad authority within the leased areas appropriate for their control and defense and added that:

> Other provisions also serve to show the nature of the grant. Thus the United States is given the "absolute right" to assume and exercise jurisdiction of all offenses within a leased area, by a British subject "apprehended therein," and by any other person, without restriction, with provision for surrender of

offenders to the appropriate authority of the Territory if the United States so elects, Art. IV (1, 2), and for surrender of offenders to the United States authorities where they are within the Territory, but outside the leased areas, Art. VIII. The immigration laws of the territory adjacent to the bases do not apply to the leased areas, Art. XIII. United States postal facilities are to be established in the leased areas, Art. XVI. No person in the leased areas serving or employed there can be subject to income tax or poll tax of the territory adjacent to the bases, Art. XVII. The leased areas are to revert to the "Lessor" only when abandoned by the United States with "notice" of such abandonment, Art. XXI. And Art. XXIV, significantly entitled "Possession," provides: "On the signing of this Agreement, leases of the Leased Areas, substantially in the forms respectively set out in Annex II hereto, shall be forthwith executed, and all rights, power, authority and control under such leases and under this Agreement (including transfer of possession where it shall not previously have been transferred) shall thereupon become effective immediately, and pending execution of such Leases they may be exercised *ad interim* and possession of the Leased Areas shall be immediately given so far as the location thereof is then ascertained. Where the precise location of a portion of any Leased Area is not ascertainable until more detailed descriptions are available, possession of such portion shall be given as rapidly as possible." 55 Stat. Pt. 2, 1569.

The Agreement does not specifically declare the leased areas to be part of the territory of the United States. It does contain, however, the following interesting negative provision: "It is understood that a Leased Area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the Leased Areas." Art. XI (4), 55 Stat. Pt. 2, 1565.

The cumulative effect of these various provisions compels the conclusion that the areas are subject to fully as complete control by the United States as obtains in other areas long known as "possessions" of the United States.

Under Art. IV (1) the United States does not have "the absolute right" of jurisdiction over the offenses enumerated therein but only the absolute right "in the first instance" to assume and exercise jurisdiction with respect to such offenses. The jurisdiction over offenses conferred on the United States by Art. IV is a limited jurisdiction, and is not confined to the leased areas but in some aspects extends also to the whole Territory in which the base is situated. During the war the U. S. has been granted *exclusive* jurisdiction over offenses committed by members of its armed forces stationed in many foreign countries; likewise exemptions from immigration laws, permission to establish postal facilities, exemption from income and other taxes, have been or are enjoyed by members of the armed forces of the United States and other governmental personnel in many foreign countries without any suggestion that by the grant

of such rights and privileges the foreign sovereign concerned has surrendered its sovereignty or bargained away its possessions. The rights and privileges given to the U. S. by the Leased Bases Agreement of March 27, 1941, as well as the restrictions placed on the U. S. by the Agreement are regarded by the Department as the conditions of use and occupancy of the leased areas and do not seem to it to indicate that such areas are possessions of the United States.

The Department regards as unfortunate the conclusion of the Court that the U. S. exercises as complete control in the leased areas as in other areas long known as "possessions" of the U. S., and its specific reference in this connection to the Philippine Islands, Swains Island, Samoa, Guam and the guano islands over all of which the U. S. exercises sovereignty, except the Philippines over which sovereignty was exercised until they were given their independence on July 4, 1946, and except the guano islands, over which, in general, the U. S. exercises exclusive jurisdiction and no other nation claims sovereignty.

Any holding that the bases obtained from the Government of Great Britain on 99 year leases are "possessions" of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought. The Department is not clear that the Court has so decided in the case under reference, but it feels that the matter is not free from doubt and in view of the

possible implications that it should not be left in that state.

The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States. The leased areas are to be held by the United States for the stated period for certain specified uses of a military nature, and the United States is not free to use them as it would its own property. This is evident from certain provisions of the Agreement of March 27, 1941. For instance, businesses cannot be established or professions practiced in the leased areas (Art. XVIII), nor can wireless stations be established or submarine cables landed except for military purposes (Art. XV), without the consent of the government of the Territory concerned, and commercial aircraft cannot operate from the bases without the consent of the Government of the United Kingdom (Art. XI). Furthermore, the United States cannot assign or underlet or part with the possession of the whole or any part of any leased area, or of any right, power or authority granted by the leases or the Agreement (Art. XXIII). The restrictions placed on use of the bases by the United States and the term of the lease are inconsistent with the conception of "possessions" of the United States as applied to the areas mentioned in the Court's opinion.

It may be of interest in connection with the foregoing to point out that the Act approved March 27, 1942 (56 Stat. 176), affords protection through the War Damage Corporation to property "situated in the United States (including the several states and the District of Columbia), the Philippine

Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States."

The Legislative history of the bill shows that during the debate in the House on March 2, 1942, Mr. Springer inquired what places were included in the final phrase "in such other places, etc." Mr. Dewey replied:

> As I recall—and I can be corrected by my colleagues if I don't state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States wherein there may be private property connected with them.

None of Mr. Dewey's colleagues did in fact correct this statement in any way. (Congressional Record, Proceedings and Debates of the 77th Congress, Second Session (Paper Edition, temporary paging), 1907.)

It would therefore appear that Congress considered this phrase necessary in order to extend coverage under the War Damage Act to the leased bases, even though the phrase "territories and possessions" was also used.

It is hoped that the above views will be of assistance to the Attorney General in determining what further action should be taken with respect to the case under consideration.

Sincerely yours,

[s] Ernest A. Gross,

ERNEST A. GROSS,
The Legal Adviser.
(For the Secretary of State.)

APPENDIX B

1 *May 22, 1942*

Dear Mr. ——:

Your letter of January 14, 1942 inquires as to the applicability of the Fair Labor Standards Act to your employment as an accountant employed at the site of construction by a firm performing a Government contract at a United States Base being constructed in the British West Indies. I regret the delay in answering your letter.

The Act is limited in its operation to employees engaged in commerce or in the production of goods for commerce among the States, territories or possessions of the United States, or from any State, territory or possession of the United States to any outside place. Since the place at which you were engaged in your duties was not a territory or possession of the United States, the Act does not apply to your employment there.

Very truly yours,

[s] L. Metcalfe Walling,

L. METCALFE WALLING,

Administrator.

104201

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2 *September 24, 1943.*

Dear Mr. ——:

This will reply to your letter of September 7, 1943 requesting an opinion as to whether the Fair Labor Standards Act applies to an employee employed by a contractor doing work for the United States Navy at Trinidad, British West Indies.

As you may know, in order for an employee to be entitled to the benefits of the Fair Labor Standards Act, he must be engaged in commerce or in the production of goods for commerce. "Commerce" is defined in section 3(b) as meaning "trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof." In section 3(c), "State" is defined as meaning "any State of the United States or the District of Columbia or any Territory or possession of the United States." Therefore, it is my opinion that the Act does not apply to work performed outside the territorial limits of the United States and its possessions irrespective of whether the employer is a corporation incorporated in one of the States of the union and the contract was made in New York State.

Very truly yours,

[s] William B. Grogan,
WILLIAM B. GROGAN,
Deputy Administrator.

451852
September 23, 1943

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3 *October 21, 1942.*

Dear Mr. ——:

This will reply to your letter of October 19, 1942, in which you inquire whether an employee working as a storekeeper for a New York corporation doing Government work at the Trinidad base is entitled to overtime compensation for hours worked in excess of eight per day.

Under the Federal Eight-Hour Law laborers and

mechanics employed by a contractor on public work for the Federal Government are entitled to time and one-half for all hours worked in excess of eight hours per day. Although this Department has no authority to interpret this statute, I believe that a storekeeper would not be considered a laborer or mechanic within its meaning.

The Fair Labor Standards Act, providing that employees engaged in interstate commerce or in the production of goods for interstate commerce must be paid overtime at time and one-half their regular rate of pay for all hours in excess of 40 in a work-week, is limited in its application to States of the United States, the District of Columbia, or any territory or possession of the United States. The Trinidad base would not appear to be a "possession" of the United States.

I do not know of any other Federal labor laws which might be applicable to the situation presented by you.

Very truly yours,

[s] Irving J. Levy,
IRVING J. LEVY,
Acting Solicitor.

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22

No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., AND THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS, *Petitioners,*

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING.

CHARLES FAHY,
JOSEPH MARKLE,
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Attorneys for Petitioners.

EDELITZ, FRENCH, FINK & MARKLE,
of counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., AND THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS, *Petitioners,*

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING.

A rehearing herein is respectfully requested for the following reasons:

1. The Fair Labor Standards Act of 1938 may not properly be applied to the Leased Areas here involved unless and until Congress exercises its discretionary function to legislate respecting those Areas under authority subsequently granted by the Agreement and Lease of 1941.

2. The Court's conclusion rests upon a rule of statutory construction novel to the history of this Court, and contrary to the intent of the Fair Labor Standards Act of 1938 and of the international arrangements for the Leased Areas in 1941.

3. Every element of fact bearing on the intent of the lawmakers confirms that the Act is inapplicable to the Leased Areas.

4. There is no basis for attributing to Congress the intent to give the term "possession" a non-political meaning solely because the Leased Areas are now held not to be "possessions" in a political sense.

5. The Court's conclusion and judgment are based on an erroneous construction of the international arrangements as granting the United States "sole power" in the Leased Areas on a par with all the powers of sovereignty exercised in the Panama Canal Zone under the Isthmian Treaty.

6. The probable extension of many other statutes of the United States to the Leased Areas by judicial construction, without Congressional sanction or the consent of the Governments concerned, will result in confusion as to applicable law in the Leased Areas, other military bases, trust territories and occupied areas, will embarrass native economies, and will impede future negotiations for other leased military bases.

I

Application of the Fair Labor Standards Act of 1938 to the Leased Areas is rested by the Court, not upon sovereignty of the United States over the Leased Areas, but upon the "voluntary grant of the authority by the sovereign lessor to legislate upon maximum hours and

minimum wages" (Opinion, p. 12). The Court states that "the leased area is under the sovereignty of Great Britain and . . . is not territory of the United States in a political sense, that is, a part of its national domain". *Id.*, p. 3. It would seem to be the view of the Court that the Area is not a "possession" in the sense of being a part of the domain of the United States; but that since the grant by Great Britain was broad enough to include the power to legislate upon maximum hours and minimum wages Congress, for reasons stated in the Opinion, is held by its use of the word "possessions" to have intended "to have the Act apply to employer-employee relationship on foreign territory under lease for bases". *Id.*, p. 12.

In so holding it is submitted that the Court overlooked what should have constituted a barrier to the conclusion reached. The grant to the United States by the sovereign lessor, the United Kingdom, was in 1941. This grant, that is, the Agreement and Lease, is the sole basis of Congressional authority in the leased Areas. The grantee, the United States, must therefore act under and pursuant to the grant. Where legislation is concerned it must act through Congress. The legislative authority found by the Court to be contained in the grant must be exercised in order to apply legislation which rests upon the power granted. The nature of the grant for military purposes emphasizes this; but it would be true even if the grant were more general. A judgment is required to be exercised by Congress on the basis of its power under the grant and on the basis of its policy to exercise such power or not to do so.

Since the power of Congress comes from the grant, as the Court states, then Congress must act under that grant before it may be invoked by the Court as the basis of legislative authority. And this of course Congress

has not done. The Fair Labor Standards Act of 1938 was not enacted by Congress in the exercise of a power granted by Great Britain in 1941. The Act stems from the power possessed by Congress as legislative authority over certain aspects of interstate and foreign commerce from the States, territories and possessions. No decision was made by Congress in 1938 under the instruments of the grant here involved, so far as wages and hours were concerned, as was done in 1941 when the Longshoremen's and Harbor Workers' Act was applied to the Leased Areas in the exercise of the powers granted under the Agreement and Lease.

The situation was quite different in *Puerto Rico* v. *Shell Oil Co.*, 302 U. S. 253. This difference has been overlooked. There Congress had legislated to the full extent of its authority over the subject matter, utilizing its plenary power over territories of the United States, i.e., under American sovereignty, as well as its power over interstate and foreign commerce. It made no difference therefore that Puerto Rico was not under United States sovereignty at the time the Act became law; that territory subsequently came within the sovereignty of the United States and thereby came within the scope of areas to which the legislation extended. Puerto Rico did not come within the legislative power of the United States pursuant to a grant of limited character to enact legislation within the limitations of the grant with sovereignty elsewhere retained. The sovereign power exercised by Congress covered sovereign territory; the time territory took that character was not material. There was thus no difference in the sovereign power exercised and the sovereign character of the authority of the United States over the area to which the legislation was thereafter held applicable.

Here there is a critical difference. The power exercised by Congress in 1938 was solely that over interstate and foreign commerce; it was not the power subsequently granted to Congress in 1941 to legislate for the Leased Areas within the terms of the Agreement. This granted power has never been considered and exercised to regulate wages and hours of work. In reaching its conclusion that Congress in 1938 by the use of the word "possessions" intended to apply the Fair Labor Standards Act to "foreign territory under lease for bases", the Court overlooks the nature of the legislative act of 1938 in comparison with the nature of the legislative consideration and action required to exercise the power granted in 1941. Emphasis though not substance is added when it is remembered that notwithstanding the remedial purpose of the Fair Labor Standards Act, it did not even exhaust the full commerce power possessed by Congress, *McLeod* v. *Threlkeld*, 319 U. S. 491, 493, much less invoke the plenary power over territories and possessions (U. S. Const. Art. IV § 3 cl. 2), or the subsequently obtained power over the Leased Areas stemming from the implied authority of the Executive to negotiate international agreements. *Curtiss-Wright Corp.* v. *United States*, 299 U. S. 304, 318.

The result is the same if it be argued that the power granted was exercised in advance of the grant of power. For there still remains the barrier to this result that the powers granted could not thus be exercised without a Congressional decision based upon them with knowledge of them. The Court it is submitted may not properly exercise this legislative function, and thereby extend to the Leased Areas and other bases all existing Federal legislation which could be applied by Congress should it choose to do so. The choice to make the appli-

cation, we submit, is for Congress, on consideration of the terms of the Agreement and the policy issues involved, including prevailing wage rates, standard and cost of living in the various localities, the effect on the economy of each British colony as a whole, and perhaps other questions of international relations or national defense.

II

Aside from the foregoing, the opinion reaches its conclusion upon the premise of a rule of statutory construction novel to the history of the Court, and which we pray should be reconsidered. It is established that if the words of a statute are ample to cover a situation which was not in the contemplation of the legislature when the words were used, nevertheless the situation is deemed to be covered unless it can be said that it would have been excluded had it been considered by the legislature. *United States* v. *Southeastern Underwriters' Association*, 322 U. S. 533, 539, 553, 560; *Puerto Rico* v. *Shell Oil Co., supra; Ozawa* v. *United States*, 260 U. S. 178, 195-196; *United States* v. *Bhagat Singh Thind*, 261 U. S. 204, 207-208. Congress need not be shown to have contemplated all applications of the language it uses. It is ordinarily enough that the language applies. In deference to the legislature the courts thus permit the intent of the legislature to coincide with the breadth of the language used. Under this rule if the Leased Areas were possessions of the United States the Act would apply though they were not within the consciousness of Congress when the Act became law. This was the situation in *Puerto Rico* v. *Shell, supra*. Subsequent to the legislation there involved, Puerto Rico came within the sovereign domain of the United States to which the language of the statute applied.

In the pending case the language is not enough of itself to cover the Leased Areas. This the Court seems to concede: "We predicate our views on the issue presented upon the postulate that the leased area is under the sovereignty of Great Britain and that it is not territory of the United States in a political sense, that is, a part of its national domain" (Opinion, p. 3). Of course if it is not territory of the United States in a political sense it is not a possession of the United States in a political sense; that is, it is not a part of its national domain. The meaning of the term "possession" therefore is construed by the Court in bringing the statute to the Leased Areas. The rule of construction above referred to accordingly has no application.

The meaning of "possession" is then divided by the Court into at least two parts. Its meaning in a political sense is laid to one side; it is then assumed that Congress did not use the term in a political sense. What is left of the term is then subjected in the context of the statute to a geographical meaning in the light of the novel rule of statutory construction which ignores all political considerations, that "our duty as a Court is to construe the word possession as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind". *Id.*, p. 10. It is respectfully submitted that this is not construing the language used by Congress, or searching for the purpose of that language, considered alone or in the full context of its use. It is, on the contrary, a determination by the Court that Congress decided to cover the Bases, in circumstances which did not exist at the time of the legislation, and also ascribes to the language used the scope the Court believes Congress would have given to the legislation itself, had the Leased Areas then been

granted. This, it is submitted, is judicial legislation; and is opposed by all that this Court has said upon the subject of separation of judicial and legislative powers.

It is one thing to say that an unforeseen situation is covered by language which is ample to embrace it when the purpose of the legislation is consistent with application of such language to those unforeseen circumstances. It is a very different thing to construe the meaning of Congress or the language itself so as to make the words serve a purpose the Court believes Congress would have desired if it had known about it, but to which Congress did not address itself. This substitutes the will of the Court for the absence of legislative consideration and enactment. This is particularly so where as here the grant of power to Congress to legislate on the subject arose subsequent to the action under consideration and when that action was not taken under the grant itself. Congress did not legislate on the basis of the scope even of its existing power to do so, much less on the basis of power alone. To include in the Act all areas where power then or thereafter might exist would re-write the statute, and would assume in advance an exercise of legislative judgment without the actual exercise of such judgment by the only branch of the government constitutionally vested with authority in that regard.

If Congress had desired that the Act of 1938 should apply to all areas over which the United States might in the future acquire by grant the implied power to regulate wages and hours anywhere in the world, it did not say so. Indeed Congress made a "deliberate and purposeful" choice not to extend the Act "to the furthest reaches of Federal authority". *McLeod* v. *Threlkeld*, 319 U. S. 491, 493, and cases there cited. The Act as written did not even utilize the Federal power over

the District of Columbia, let alone that over Leased Areas located throughout the world not under the sovereignty of the United States, and obtained by international agreements with limited scope and for limited purposes—in this instance, national defense—a situation utterly unforeseeable in 1938.

III

Assuming the correctness of the rule of construction applied by the Court, it is necessary to examine all the surrounding circumstances to apply that test—namely, what the lawmakers "would have done had they acted at the time of the legislation with the present situation in mind". We submit that every element of fact bearing on the issue opposes the inference drawn by the Court.

(i) Granted that Congress did not specifically refer to coverage of the Guantanamo Naval Station, leased in 1903, the lease by Cuba forbade any private production or commercial activity therein, within the general design of the Act of 1938; the Attorney General had previously held that the Guantanamo Station was not a "possession" of the United States, as that term had always been understood in our jurisprudence; and there was nothing to the contrary in 1938 in the practices or decisions of any branch of our Government. There was likewise no reference in the legislative history to the Canal Zone, but this Court had previously concluded that the area "belonged to" the United States, *Wilson* v. *Shaw*, 204 U. S. 24, 33, and the Department of State had previously insisted that under the Isthmian Treaty, the United States exercised in perpetuity therein all the powers of sovereignty, to the complete exclusion of any exercise of sovereign rights, power or authority by the Republic of Panama. 2 *Hackworth, Digest of In-*

ternational Law, pp. 172, 801-805. Well-established canons of construction vouchsafed that the word "possession" would be given its usual meaning, that is, as including such areas as Puerto Rico and the Canal Zone and excluding the leased area at Guantanamo Bay.[1] The Wage-Hour Administrator promptly confirmed this in regulations based on such usual meaning, and such regulations have remained to this day unchanged by the Administrator or by Congress.

(ii) On June 26, 1940, just prior to the negotiations for the Leased Areas here involved, Congress amended the Act at the request of the Wage-Hour Administrator, by modifying the homework and minimum wage provisions to meet the special economic conditions regarding production for commerce from the Virgin Islands and Puerto Rico. 54 Stat. 615, 29 U. S. C. §205e, 206(5). The gross disparities between the economies of those areas and the continental United States led Congress to withdraw the full application of the Act respecting those areas. *Hearings on H. J. Res. 544*,

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[1] As for the other leased bases cited in the Court's opinion (p. 7), we are advised that the United States has never implemented in any way the 99-year leases granted by Nicaragua under the Bryan-Chamorro Convention of 1914. 39 Stat. 1661. The military bases contemplated in the Philippine Islands under the Independence Act of 1934, also cited in the Opinion, likewise were not in being when the Fair Labor Standards Act was passed, and the latter Act in no case applied to the Philippines since the Islands were not specifically mentioned as required by general statute. 39 Stat. 547, 48 U. S. C. § 1003. Moreover, under the Independence Act of 1934 and the Proclamation of Philippine independence in 1946, the United States *excepted* military bases from the general transfer of property and sovereignty to the Philippine Commonwealth. 48 Stat. 456, 459, 463, 48 U. S. C. §§ 1235, 1240(b); 58 Stat. 626, 48 U. S. C. § 1235a; 60 Stat. 1352. See Exchange of Notes annexed to *Treaties and Other International Acts Series 1775*, March 14, 1947.

Committee on Appropriations, U. S. Senate, 76th Cong. 3d Sess., pp. 1-4; S. Rep. 904, Committee on Education and Labor, U. S. Senate, 76th Cong. 1st Sess., pp. 1-4. The object of the measure, as explained by the Wage-Hour Administrator, was "to fix wage rates for these islands which are high enough to discourage migration of business from the United States, but which are low enough to encourage industrial development and to provide employment opportunities in the islands". *Id.*, p. 4. The Administrator has subsequently opposed and Congress has rejected legislation to disregard such considerations and eliminate the modifications applicable to production for commerce from these Atlantic possessions. E.g., S. 1349, 79th Cong. 1st Sess. *Hearings on S. 1349*, Committee on Education and Labor, U. S. Senate, 79th Cong. 1st Sess., p. 260.

Congress thus plainly indicated, before and since the Leased Areas were negotiated, that special economic considerations required special statutory treatment even regarding those Atlantic outposts within the sovereign domain of the United States and indisputably covered by the statute. It cannot be inferred that Congress was less sensitive to comparable economic considerations affecting the full application of the Act in British-owned Atlantic outposts where we were mere lessors for a term, with only the right to fortify and defend, and with no right whatever to produce goods for commerce or otherwise to carry on private commercial enterprise.

Of course the Act continues to be technically applicable in certain sparsely populated Pacific Islands (Guam, American Samoa), but that results from the fact that they are ceded territory under our sovereignty, and consequently "possessions of the United States".

(iii) After the Leased Areas were negotiated in 1940-41 the Administrator did not amend his regulations to embrace them, and he specifically ruled they were not included in the term "possession". In this connection it was apparent that in the Leased Areas, as in Guantanamo Bay, no private commercial or production activity could be carried on, of the type within the purview of the Act; and that the primary private employment involved would be on military construction work likewise beyond the scope of the Act. *Cf. Murphey* v. *Reed*, No. 206, October Term 1948.

(iv) Congress promptly confirmed the Administrator's interpretation when it enacted in 1941 and 1942 the War Damage and Defense Base Acts, which specifically referred to the Leased Areas as separate from and in addition to the "possessions" of the United States. Granted that the problems there involved were "not specifically considered" in 1938, as the Court's opinion declares (p. 10, note 12), this period was the earliest Congress could have considered the Leased Areas, except as the earlier general factors already cited indicated an intent to exclude any area merely leased for a term for military purposes.

We respectfully submit that if judgment is to be instructed by the intent of the lawmakers, the foregoing can lead to but one conclusion, that the Leased Areas are not "possessions" of the United States as that term is used in the Fair Labor Standards Act of 1938 and other statutes.

IV

The Opinion (pp. 9-10) states that Congressional intent as to inclusion of the Leased Areas is not definitely indicated by use of the term "possession". Authority to apply wage and hour legislation is derived, at

best, only by implication from a general grant of control for military purposes, in a non-commercial area, stemming from the subsequent international agreement which makes the grant. It would seem clear that the Court owes to Congress the right to make the decision under the power thus granted to Congress. This is emphasized by the fact that Congress had already in 1940 excluded full application of the Act even to Caribbean islands under United States sovereignty, i.e., Puerto Rico and the Virgin Islands, both plainly within the coverage of the Act. Especially where the authority of the Congress is subsequently acquired by international agreement which is silent on the precise matter, even if broad enough in terms to include authority over wages and hours, we submit that the conceded failure of existing legislation definitely to include the bases creates the very situation where responsibility must be exercised by Congress under the powers granted it by the Agreement. Otherwise the uncertainty found by the Court is resolved by a wholly unnecessary surmise as to what Congress would have done under circumstances non-existent when it acted; and the surmise takes a form contrary to the known action of Congress in each instance in which it has legislated with respect to the Leased Areas, namely, its treatment of them as not being "possessions". The legislative pattern is clear. Congress would have used appropriate words to convey its meaning, as it has consistently done in legislating for these Leased Areas when it has intended to cover them, or it may have decided not to cover those Areas.

To reach its conclusion the Court goes further than deciding now what it surmises Congress would have done. It decides also that Congress did not in fact use the term "possessions" in a political sense, and it does

this simply because long afterwards the Court itself cannot say that the Leased Areas are possessions in a political sense. No basis is stated for attributing a non-political meaning to Congress. The full context itself is to the contrary:

"any State of the United States or the District of Columbia or any Territory or possession of the United States". The Fair Labor Standards Act was framed with regard to the political power of Congress over the domain of the United States within the reach of the commerce clause. In fact it did not exercise its power co-extensive with that domain as it existed in 1938. *Supra*, p. 5. *A fortiori*, it did not exercise its power more extensively.

We submit there is no basis for attributing to Congress a non-political meaning because of the subsequent conclusion of the Court that the bases are not possessions in a political sense.

V

Granting that sovereignty over the Leased Areas is retained by the British Crown, such sovereignty is a mere abstraction except as it embodies "supreme powers of legislation and government". *Cf. Posados v. National City Bank*, 296 U. S. 497, 502. By its unanticipated interpretation that the term "possession" is not a word of art, the Court holds open the strong probability that many other statutes covering "possessions" of the United States will be held applicable to the Leased Areas here involved, to other bases leased for shorter periods, as well as to the Trust Territory of the Pacific held under the United Nations.

This conclusion, and the resulting judgment for the respondents, it is submitted are based on an erroneous

construction of the international arrangements as granting the United States "sole power" in the Leased Areas on a par with that in the Panama Canal Zone. The authority of the United States in the latter explicitly embraces all the powers of sovereignty, whereas in the Leased Areas it is carefully restricted to the military needs and character of the bases. Pet. Br. pp. 19-38. The Leased Areas are not part of American sovereign domain, such as Territories or possessions. They represent rights to be exercised at our discretion and within prescribed limits, to occupy and fortify designated areas in *British* possessions; and if this includes the power to legislate regarding wages and hours that power arises from the terms of Article I of the Agreement, not from a grant of sovereign power as in the case of the Canal Zone.

To the extent that statutes of the United States applicable generally to United States "possessions" are extended to the Leased Areas by judicial construction, without Congressional sanction and determination of military necessity or need incidental thereto, far-reaching and unanticipated provisions will have been added to the carefully drafted terms in international agreements governing the limited use and occupation of such military base areas—and this without the consent of the foreign governments directly concerned or Act of Congress under the agreements. The subject matter of such statutes may range from nationality to postage, labor disputes to taxation.

VI

The inevitable consequence of the foregoing will be confusion as to applicable law in existing leased bases, embarrassment to native economies, conflict with local

wage standards for native labor, and impediment to the negotiation of other bases by the Executive as required by the international situation from time to time. American contractors and Government agencies will be unable to make practicable arrangements for work in leased areas or trust territory, in the present circumstances of uncertainty as to the applicable law. Moreover, the breadth of the decision will undoubtedly give rise to vexing litigation as to the applicability of many statutes of the United States in former enemy territory occupied by our armed forces. *Cf. Republic Aviation Co.* v. *Lowe,* 164 F. 2d 18 (C. C. A. 2d), *cert. den.* 333 U. S. 845; *Brewer* v. *United States,* 79 F. Supp. 405 (N. D. Cal.); *Brunell* v. *United States,* 77 F. Supp. 68 (S. D. N. Y.).

None of these consequences, already felt or reasonably to be anticipated, need occur in order to accomplish the Congressional purpose in the Fair Labor Standards Act. That Act simply did not cover the Leased Areas and was not enacted pursuant to the authority contained in the grant of them. Congress is free to decide, and to Congress should be left the decision, whether to include the Leased Areas in the coverage of the Act, dependent on whether it deems it advisable so to do and within the authority granted under the Agreement.

CONCLUSION.

For the foregoing reasons and because of the public interest in the question and the serious consequences of the opinion and judgment rendered, it is respectfully requested that this application for rehearing be granted, and the cause reargued before the full bench if practicable.

Respectfully submitted,

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JOSEPH MARKLE,
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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CHARLES FAHY,
Attorney for Petitioners.

Office-Supreme Court, U.S.
FILED
JAN 3 1949
CHARLES ELMORE CROPLEY

No. 23

In the Supreme Court of the United States

October Term, 1948

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., ET AL.,
PETITIONERS

v.

JOHN JOSEPH CONNELL, ET AL.

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF PETITION FOR REHEARING

The Solicitor General urges that the Court reconsider its holding herein that the word "possession," as used in the phrase "State * * * or any Territory or possession" in Section 3 (c) of the Fair Labor Standards Act, is not a word of art and that the Bermuda defense area leased to this country in 1940 by Great Britain is within the coverage of the statute as a "possession."

It is anticipated by the Government agencies directly concerned that grave difficulties will necessarily flow from this decision. To a certain extent, consequences of first importance were indicated by the Department of State letter set forth in the Government's *amicus* brief earlier

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filed in this case (pp. 49–54). A further communication from the Department of State, attached hereto as Appendix A, pp. 8–10, reiterates and enlarges upon the earlier letter, both emphasizing the belief that the decision now reached by this Court will have "an unfavorable effect on the foreign relations of the United States, both with respect to the bases leased from Great Britain under the Agreement of March 27, 1941 and bases acquired from other countries * * * [and] might make more difficult negotiations for similar bases in the future."

This view of the State Department is strongly supported by the Departments of the Army and Navy. Statements from those agencies, annexed hereto as Appendices B and C, pp. 11–19, also point out in some detail the problems, particularly those arising from the use of foreign employers and alien labor, which will be immediately encountered in existing classified as well as unclassified defense areas. The letter from the Army states:

> To give appropriate effect to the just-quoted ruling of the Court will impose the most serious problem of any arising from the decision. During the past nine years of employment experience in foreign countries, Army contracting officers have discovered (whether the employment was handled directly or through a CPFF contractor) that in hiring native workmen the local government in many countries will

impose *maximum* wage standards which dare not be violated. These standards are sometimes fixed by statute or regulation with the force of statute, and other times by policy which has the practical effect of law. Such governments explain that to pay native workmen according to American wage standards would seriously disrupt the local economy. Also, in many industrially undeveloped countries, local officials advise that "excessive" wages to common laborers would jeopardize the availability of such laborers and impose serious police problems upon the state. (It should be noted that the social and economic structure of many areas, organized along tribal lines, precludes a direct dealing with individual laborers.) It appears doubtful that the Court has been sufficiently apprised of this special problem. The payment of statutory overtime to American personnel at contractors' overseas construction sites will be a minor problem in comparison with paying of statutory minimum wages *and* overtime to native workmen in the face of militant opposition by foreign governments. (It should be noted that among American personnel all laborers and mechanics, skilled and semi-skilled artisans and craftsmen, have always been paid on hourly rates with overtime benefits far exceeding statutory requirements; the only employees of Army contractors—at either continental or overseas sites—who have not been extended pay benefits within the letter of the statute

are the so-called non-manual employees; these non-manuals include office and white-collar personnel, specialists, supply and security workers, and semi-supervisory employees, hired on a salary basis.)

* * * * *

Two specific rulings of the Court—that native workmen are covered by the Act, and that these bases on foreign soil are "possessions" of the United States in spite of foreign sovereignty—may be expected to render extremely difficult, if not impossible in some instances, the efforts of the Department of the Army in carrying out its governmental function of implementing the defenses of this country at strategic global sites on foreign soil. Although it is too early to predict the effect of the decision upon the continued prosecution of the projects listed above, it would not be unexpected if some of the foreign governments involved were to compel the curtailment or abandonment of said projects. It certainly must be expected that the negotiation of future arrangements for base construction on foreign soil (in which representatives of this Department ordinarily participate) will be met by vigorous opposition on the part of some foreign governments in the face of these two specific holdings of the Court. The uncertainty of the scope of this decision, with respect to the type of authority the United States exercises at the situs of various overseas operations—as pointed out in the minority

> opinion of the Court—will undoubtedly further handicap such future negotiations, inasmuch as no foreign government can any longer be certain that clear limitations placed in any lease or agreement will not subsequently be "lightly repudiated by another branch of our Government."

The Wage and Hour Administrator has, at our request, stated some of the problems of administration and enforcement of the Fair Labor Standards Act which flow from the decision. His views are set forth in Appendix D, pp. 20–24.

We believe that the Departmental views contained in the statements annexed hereto justify our request that the Court reconsider its decision herein before permitting the judgment to become final. For they demonstrate that this Court had not adequately been apprised of the practical effects of subjecting foreign workers to the Fair Labor Standards Act, both in regard to its impact on foreign policy and upon the actual administration of the American statute. We think these factors demonstrate that if Congress had addressed itself to the instant problem it would not have wished the American labor standards act to apply in the leased areas.

In addition, we wish to direct the Court's attention to the far-reaching effect that the present decision will have as a general precedent for giving extra-territorial effect to many existing statutes. For the decision raises problems which

it does not answer as to the territorial scope of every statute containing the same or similar language; it certainly cannot now be said with any safety that any such laws do not apply to the leased areas, and unless the decision is changed there will be continued uncertainty both in and out of the United States as to what is the applicable law.

A graphic illustration is furnished by the opinion of the Court of Appeals for the Second Circuit in *Spelar* v. *United States*, C. A. No. 33, October Term, 1948, decided December 8, 1948, Appendix E, pp. 25–31, *infra*. In the *Spelar* case, the Court of Appeals held that the Federal Tort Claims Act applied in defense base areas largely on the strength of this Court's decision in the instant case. The language there involved concerned exclusion from the coverage of the Federal Tort Claims Act of any claim "arising in a foreign country." 28 U. S. C. 943 (k). No particular note was made by the Court of Appeals of the difference between that language and the language of the Fair Labor Standards Act involved herein. Nor did the Court of Appeals inquire into the legislative purpose under the Tort Claims Act or analyze the provisions of that statute. Rather, the decision herein was taken as conclusive on the status of defense base areas for purposes of construing general statutory provisions. The understanding of the court of ap-

peals as to the effect of the decision herein is illustrated by that court's characterization of the lease to the United States of the base in Newfoundland as involving "the cession of the area * * * [with] the fact of grant and occupancy * * * not challenged * * *."

For the reasons set forth above, we urge that rehearing be granted herein and that the Government be afforded full opportunity to present its views by brief and oral argument.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1948.

APPENDIX A

(Department of State Letter)

DECEMBER 16, 1948.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to the Department's letter of January 30, 1948 concerning the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *John Joseph Connell, et al.* v. *Vermilya-Brown Company, Inc., et al* holding that the defense bases in Bermuda are "possessions" of the United States within the meaning of the Fair Labor Standards Act of 1938.

The letter referred to indicated the Department's concern that the decision would have an unfavorable effect on the foreign relations of the United States, both with respect to the bases leased from Great Britain under the Agreement of March 27, 1941 and bases acquired from other countries. Moreover, it pointed out that the decision might make more difficult negotiations for similar bases in the future. The authority of the Supreme Court's decision of December 7, 1948 affirming the judgment of the Circuit Court of Appeals has of course increased the concern felt by the Department. While the Court's postulated agreement with the Department's view that the bases leased from Great Britain remain under its sovereignty and are not part of the territory of the United States in a political sense removes the uncertainty on this point left by the decision

of the Circuit Court of Appeals, the conclusion of the Court that the bases are "possessions" of the United States and the bases on which that conclusion was reached are not reassuring.

As indicated in the letter of January 30, 1948, the Department considers unfortunate the conclusion of the Circuit Court of Appeals that the United States leased base in Bermuda is a possession of the United States comparable to other areas long known as "possessions" of the United States such as Alaska, Hawaii, Puerto Rico, Guam, Samoan Islands, Virgin Islands and the Canal Zone. The territories referred to are under the sovereignty of the United States, with the exception of the Canal Zone in which the United States exercises full sovereign rights. No comparable situation exists in Bermuda or the other bases leased from Great Britain nor does the United States have "sole power" in the leased areas as inferred by the Court. The rights of the United States as indicated in more detail in the letter of January 30, 1948 are limited to those necessary to operate the leased areas as military bases and are not full sovereign rights such as those it enjoys in the Canal Zone. Furthermore, the Department does not share the assurance of the Court that the house of assembly of Bermuda or other colonial legislatures might not undertake legislation similar to the Fair Labor Standards Act to control labor relations on the bases. It is at least worthy of note in this connection that administrative difficulties have arisen in the bases by reason of the application to contractors' employees of workmen's compensation laws of both the United States and the colonies concerned.

The Department understands that a petition for a rehearing of the case before the Supreme Court will be filed and will be supported by the Department of Justice on behalf of the Government. The purpose of this letter is to indicate the Department's full support of that petition in view of the unfavorable implications of the Court's decision from the standpoint of the foreign relations of the United States.

Sincerely yours,

For the Secretary of State:

JACK B. TATE,
Acting Legal Adviser.

The honorable TOM C. CLARK,
Attorney General.

APPENDIX B

(Department of the Army Letter)

11 DECEMBER 1948.

THE HONORABLE
THE ATTORNEY GENERAL

DEAR MR. ATTORNEY GENERAL: Reference is made to the lawsuit of *Vermilya-Brown et al.* vs. *Connell et al.* (No. 22 in the Supreme Court of the United States) which involves Fair Labor Standards Act claims by former employees against a Department of the Army cost-plus-a-fixed-fee contractor who built defense bases in Bermuda pursuant to our 99-year lease with Great Britain.

The principal contention of the petitioner (Vermilya-Brown) was that the F. L. S. Act did not apply to employment in leased areas on foreign soil inasmuch as the geographical coverage of said Act was limited to the continental United States and the "Territories and possessions." As you know, the Court, by a 5 to 4 decision, on 6 December 1948 ruled against the petitioners, holding that the word "possession" as used in the statute is not a "word of art" and that it includes those areas over which the United States has "sole power" whether or not it has "sovereignty" over them (17 Law Week 4033).

It is the opinion of this Department that such holding is extremely unfortunate and was not compelled by any of the considerations present

in the case, and it is hoped that the Court may be induced to set aside the initial decision upon a full consideration of the grave and far-reaching implications that stem from this decision. Counsel for petitioners have already been instructed to petition for a re-hearing of the matter. Upon the request of this Department, and with the written support of the Department of State, your Department filed a Memorandum with the Court in support of the Petition for Writ of Certiorari, and thereaffer filed a Brief as Amicus Curiae supporting the petitioner's position. In view of the subsequent developments related above, it is requested that your Department file with the Court a Brief as Amicus Curiae in support of the forthcoming Petition for Rehearing.

It may be noted that the practice and policy of the contracting Agencies for operations in foreign areas (principally the Departments of the Army and Navy), as well as the official pronouncements of the Departments of State, Justice and Labor, are contrary to this holding of the Court. Moreover, the position that the word "possession" as used in this statute *is* a "word of art" appears to be strongly supported by the fact of its uniform use in similar statutes over a period of many years. In his dissent Justice Jackson cites 63 statutes using the phrase "Territories and possessions," and 12 others which refer to "island" or "insular" possessions.

Although Army CPFF contractors who have operated in leased foreign areas have only twelve or fifteen F. L. S. A. suits now pending against them arising from such "foreign" employment, the implications of this decision on present and

future overseas construction operations of the Army are tremendous. By virtue of said decision, the Act immediately applies, retroactively for one year, to the following partially completed projects:

The Philippines—two contracts—70 million dollars
Newfoundland—one contract—25 million dollars
Okinawa—three contracts—47 million dollars
Iceland—one contract—17 million dollars
Greece—two contracts—80 million dollars
Bermuda—one contract—2 million dollars
Canada—one contract—½ million dollars

All but the Canadian contract are of the CPFF type under which the Government will bear the increased labor cost. As to future contracts, the Government will bear such increased labor cost even under "lump-sum" contracting because of the higher bids which will inevitably result. The increase thus to be expected in present and future contract costs for foreign construction cannot be predicted with any degree of accuracy, but judging by experience statistics on work within the United States the increase will doubtless run into the hundreds of millions.

In addition to the present projects listed above there are other CPFF construction contracts now being performed on foreign soil which cannot be identified here because such operations are of a "classified" nature. Judging by war-time experiences, it may be noted in passing that the difficulty of maintaining appropriate secrecy as to such projects is heightened considerably by the litigation which inevitably results from injecting

doubts and problems over statutory labor rights into the situation.

An immediate result of this decision will be the necessary revision by Army and Navy contracting agencies of their entire labor relations policy for overseas areas, as well as the organization, records and arrangements for each existing contract; moreover, the estimated cost of each contract will have to be increased sharply, with the alternative result of eliminating various vital portions of the projects or of obtaining supplemental appropriations therefor. The principal portion of such increased cost will result, not from overtime allowance for American personnel, but, from the increased wage rates for native workmen (who outnumber the American workmen by about 10 to 1) that will be required by the minimum wage provisions of the Act. The application of such wage minimums to native workmen is clearly required by the Court's language in this decision: "Since citizens of this country (Bermuda) would be numerous among employees on the base, the natural legislative impulse would be to give these employees the same protection that was given those similarly employed on the islands of the Pacific (Territories and possessions such as Hawaii, Guam, etc)."

To give appropriate effect to the just-quoted ruling of the Court will impose the most serious problem of any arising from the decision. During the past nine years of employment experience in foreign countries, Army contracting officers have discovered (whether the employment was handled directly or through a CPFF contractor) that in hiring native workmen the local govern-

ment in many countries will impose *maximum* wage standards which dare not be violated. These standards are sometimes fixed by statute or regulation with the force of statute, and other times by policy which has the practical effect of law. Such governments explain that to pay native workmen according to American wage standards would seriously disrupt the local economy. Also, in many industrially undeveloped countries, local officials advise that "excessive" wages to common laborers would jeopardize the availability of such laborers and impose serious police problems upon the state. (It should be noted that the social and economic structure of many areas, organized along tribal lines, precludes a direct dealing with individual laborers.) It appears doubtful that the Court has been sufficiently apprised of this special problem. The payment of statutory overtime to American personnel at contractors' overseas construction sites will be a minor problem in comparison with paying of statutory minimum wages *and* overtime to native workmen in the face of militant opposition by foreign governments. (It should be noted that among American personnel all laborers and mechanics, skilled and semi-skilled artisans and craftsmen, have always been paid on hourly rates with overtime benefits far exceeding statutory requirements; the only employees of Army contractors—at either continental or overseas sites—who have not been extended pay benefits within the letter of the statute are the so-called non-manual employees; these non-manuals include office and white-collar personnel, specialists, supply and security workers,

and semi-supervisory employees, hired on a salary basis.)

The further problem of administration is posed by the fact that the decision of the Court does not delineate with certainty the areas to which the coverage of the Act is now extended. The Court has said: "* * * it is difficult to formulate a boundary to its coverage short of areas over which the power of Congress extends, by our sovereignty or by voluntary grant of the authority by the sovereign lessor, to legislate * * *" and "it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than to limit the coverag to sovereignty." If in fact the United States does have "sole power" over the leased base in Bermuda (in spite of the apparent limitations imposed by Great Britain), then it is difficult to see how application of the Act can stop short of "Trust" areas, mandated areas, areas under informal rights of entry, diplomatic posts, occupied enemy countries etc.

Two specific rulings of the Court—that native workmen are covered by the Act, and that these bases on foreign soil are "possessions" of the United States in spite of foreign sovereignty—may be expected to render extremely difficult, if not impossible in some instances, the efforts of the Department of the Army in carrying out its governmental function of implementing the defenses of this country at strategic global sites on foreign soil. Although it is too early to predict the effect of the decision upon the continued prosecution of the projects listed above, it would not be unexpected if some of the foreign governments involved were to compel the curtailment or aban-

dominent of said projects. It certainly must be expected that the negotiation of future arrangements for base construction on foreign soil (in which representatives of this Department ordinarily participate) will be met by vigorous opposition on the part of some foreign governments in the face of these two specific holdings of the Court. The uncertainty of the scope of this decision, with respect to the type of authority the United States exercises at the situs of various overseas operations—as pointed out in the minority opinion of the Court—will undoubtedly further handicap such future negotiations, inasmuch as no foreign government can any longer be certain that clear limitations placed in any lease or agreement will not subsequently be "lightly repudiated by another branch of our Government."

Sincerely yours,

/s/ KENNETH C. ROYALL,
Secretary of the Army.

APPENDIX C

THE SECRETARY OF THE NAVY,
Washington, 14 December 1948.

MY DEAR MR. ATTORNEY GENERAL: On December 6, 1948, the Supreme Court of the United States, by a five to four decision, affirmed the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Vermilya-Brown Company, Inc., et al.* v. *Connell et al.* In this action, the Court held that the Fair Labor Standards Act of 1938 was applicable to territory leased by the United States from Great Britain.

The Department of the Navy is interested in the ultimate disposition of the *Vermilya-Brown* case since the application of the Fair Labor Standards Act to work performed by the Navy's cost-plus-a-fixed-fee contractors at the leased bases would not only increase the cost of such work but would, in our opinion, adversely affect future operations. In this connection, you are advised that several of such actions have been brought against contractors for work performed at such bases. Consequently, if the decision in the *Vermilya-Brown* case is permitted to stand, it may subject this Department to a substantial financial liability.

It has been and is the policy of this Department to employ local labor at the leased bases to the maximum extent practicable and to make its wage and labor practices with respect thereto conform as nearly as possible to the usual wage and labor practices of the particular locality. Appli-

cation of the Fair Labor Standards Act to the particular areas involved may well create conditions which would adversely affect the cooperation heretofore given Navy contractors by local authorities. The continued cooperation of such authorities is, of course, highly desirable.

In view of the foregoing, I believe it would be to the best interests of the Government for a petition for rehearing to be filed with the Court if, in your opinion, sound legal grounds exist for such action.

Sincerely yours,

/s/ M. E. ANDREWS,
Acting Secretary of the Navy.

THE HONORABLE TOM C. CLARK,
Attorney General of the United States,
Washington, D. C.

Copy to
Mr. Frank Tribbe
T-7, Rm 1523, Grav. Pt., Va.
Mr. Bernard S. White
2B78 Y&D Annex

APPENDIX D

U. S. DEPARTMENT OF LABOR

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

WASHINGTON 25, D. C., *December 23, 1948.*

The HONORABLE PHILIP B. PERLMAN,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: By letter dated December 22, 1948, you advise that you intend to support a petition for rehearing to be filed in connection with the recent decision of the Supreme Court in *Vermilya-Brown Company* v. *Connell*, No. 22, This Term, decided December 6, 1948. You state that you will present to the Court the views of the Departments of State, Army, and Navy. On behalf of these Departments, and the Department of Justice, you will urge the Court to reconsider its holding that the word "possession," as used in the phrase "State, territory or possession" in Section 3 (c) of the Fair Labor Standards Act, is not a term of art, and that the Bermuda defense area leased to us in 1940 by Great Britain is within the coverage of the statute as a "possession." You request that I forward to you my views concerning the effect which this holding may have on administration and enforcement of the Act.

I think it may fairly be said that my predecessors and I, in considering the territorial aspects of wage-hour coverage in the past, have proceeded on the assumption that traditional concepts of sovereign control were implicit in the meaning of the phrase, "any Territory or possession of the United States," as that phrase is used in the Fair Labor Standards Act. In the absence of controlling court decisions, it was necessary for us to interpret the phrase for our guidance in the administration of the Act. In doing so, we not only studied the provisions of other statutes in which these terms were used and authoritative decisions of the courts construing such language in situations which were thought to be comparable, but gave particular weight to authoritative expressions of the State Department and other proper governmental agencies on the question of what areas are viewed as Territories or possessions over which the United States exercises full sovereign rights. On this basis we expressed the opinion in Interpretative Bulletin No. 2, first issued in November, 1938, and in Chapter V, Part 776, Title 29 of the Code of Federal Regulations (section 776.1 (c)) which replaced this bulletin in July, 1947, that Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, and the Virgin Islands were Territories and possessions within the meaning of the Act.

When the question of the status of the leased bases of the type involved in the *Vermilya-Brown* case was first brought to our attention in 1942 and 1943, we expressed the view, in the opinions quoted in the Government's brief before the Supreme Court, that these bases were not Terri-

tories or possessions of the United States within the meaning of the Act. This view was subsequently modified after it appeared that the matter was being litigated in the courts and consultation with State Department officials indicated that that Department had made no ruling (the letter from that Department which is Appendix A to your brief not having been written at that time). This modification of our position is reflected by the following language which was used to advise inquiries: "Until the question has been settled by court decisions, congressional or executive action, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees working at bases leased from the British."

As a result of the Supreme Court's decision in the *Vermilya-Brown* case, it appears that the status of a given area as a "Territory or possession of the United States" for purposes of the Act is subject to determination on the basis of considerations other than those used by the political departments of the Government, on which we have placed particular reliance in the past. I anticipate that at least two major problems will confront me as a result of the Court's ruling.

First, in order to perform my statutory duties under the Act, it will be necessary for me to decide initially, pending authoritative guidance from the courts, whether other defense base areas come within the statutory language covering Territories and possessions of the United States. If, as would seem to follow from the Court's decision, I would not be aided in this by the views

of the State Department as to whether such areas are Territories or possessions in the political sense, or under traditional concepts of sovereignty, I shall be called upon to enter a field of interpretation in which our previous experience with the Act offers no reliable guides, and which may involve the meaning of international agreements on which this agency would ordinarily seek the advice of the State Department. Adequate standards for guidance in deciding such questions for purposes of administration of the Act are, in my opinion, not available to me, either in the language of the statute, its legislative history, or in the *Vermilya-Brown* decision itself. The difficulty, in such circumstances, of reaching sound conclusions concerning coverage in bases such as Okinawa, Greece, Iceland, Canada, Newfoundland, the Philippine Islands, Tunisia, and Arabia is apparent. My position will be even more difficult in connection with classified military base areas.

Second, even if I should be able to reach sound conclusions as to the application of the Act in these areas, I cannot help but foresee fundamental administrative difficulties in attempting to apply the Act in "possessions" over which the United States does not exercise full sovereign rights, especially where foreign employers and alien labor are involved. Even if such difficulties may not be insuperable, vexing problems of courts with proper jurisdiction and venue to apply the criminal and civil sanctions in such cases are, it seems to me, bound to arise if we are to undertake active enforcement in these bases. And, as you will appreciate, neither the appropriation

for, nor the originization of the Wage and Hour Division were devised in contemplation of enforcement efforts in outposts such as these.

It has, of course, not been possible for us to explore fully these and other possible problems which might confront us as a result of the *Vermilya-Brown* decision, in the limited time available to us by reason of the period for filing petitions for rehearing. If the Court should grant a rehearing in the case, I shall be glad to make available to you the results of our further exploration of these questions in order that you may fully apprise the Court of my views concerning the probable effects of the present decision in terms of the over-all administration of the Fair Labor Standards Act.

Very truly yours,

WM. R. MCCOMB,
Administrator.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 33—OCTOBER TERM, 1948

(Argued November 3, 1948—Decided December 8, 1948)

DOCKET NO. 21041

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before: L. Hand, Augustus N. Hand and Clark, *Circuit Judges*

Appeal from the United States District Court for the Eastern District of New York.

Action for wrongful death under the Federal Tort Claims Act by Lillian Spelar, as administratrix of the estate of Mark Spelar, deceased, against the United States of America. From an order dismissing the complaint for lack of jurisdiction, D. C. E. D. N. Y., 75 F. Supp. 967, the plaintiff appeals. Reversed and remanded.

Arnold B. Elkind, of New York City (Gerald F. Finley, of New York City, on the brief), for plaintiff-appellant.

Frank J. Parker, Chief Asst. U. S. Atty., of Brooklyn, N. Y. (J. Vincent Keogh, U. S. Atty., of Brooklyn, N. Y., on the brief), for defendant-appellee.

CLARK, Circuit Judge:

Does the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country," 28 U. S. C. A. § 943 (k), Revised Title 28, United States Code, § 2680 (k), prevent recovery from the United States of America for wrongful death occurring on a Government airfield in Newfoundland in an area covered by a 99-year lease and executive agreement as a part of the famous "destroyer deal" between Great Britain and the United States of March 27, 1941? In dismissing this action the district court has held that it does. D. C. E. D. N. Y., 75 F. Supp. 967. We are constrained to disagree.

Plaintiff is administratrix of her husband's estate under letters issued by the Surrogate's Court of Queens County, New York. Her husband was a flight engineer, an employee of American Overseas Airlines, Inc., who was killed by the crashing of his plane just as it had taken off from Harmon Field, in or near Stephenville, Newfoundland, on October 3, 1946. Compare *Spelar v. American Overseas Airlines, Inc.*, D. C. S. D. N. Y., 80 F. Supp. 344. Plaintiff's complaint alleges that his death was due to the negligence of representatives of the United States and that un-

der the laws of Newfoundland, Consol. Stat. of Newfoundland, 3d Ser., c. 213, an action for wrongful death is created, upon which the plaintiff relies as establishing her claim under the Federal Tort Claims Act. The complaint was dismissed below on the defendant's motion for lack of jurisdiction.

The Act as passed in 1946 gave exclusive jurisdiction to the United States district court for the district wherein the plaintiff was resident or wherein the act or omission complained of occurred, "including the United States district courts for the Territories and possessions of the United States," on claims against the United States for death by the negligent or wrongful act or omission of any Government employee while acting within the scope of his employment, "under circumstances where the United States, if a private person, would be liable to the claimant for such * * * death in accordance with the law of the place where the act or omission occurred." 28 U. S. C. A. § 931 (a). This is continued in the revision, Title 28, United States Code, § 1346 (b), except that here the district courts are spelled out to designate those of Alaska, the Canal Zone, and the Virgin Islands. Since obviously the revision was not intended to limit the coverage, the reference to the original form is of importance, as indicating a congressional recognition of claims in the "possessions" of the United States.

The nature of the 99-year lease and executive agreement entered into between Great Britain and the United States, as set forth in 55 Stat., Pt. 2, 1560–1594, is discussed at some length in

Connell v. *Vermilya-Brown Co.*, 2 Cir., 164 F. 2d 924, where we held that the Bermuda base transferred pursuant to this same agreement was a "possession" of the United States within the applicability of the Fair Labor Standards Act. Since the argument of this appeal, the Supreme Court has affirmed that case. *Vermilya-Brown Co.* v. *Connell*, S. Ct., Dec. 6, 1948. Although different statutes are involved, it would seem clear that that decision is certainly persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another. Moreover, in the passage quoted above, Congress appears to have recognized the applicability of the Act to possessions of the United States. While defendant here did not cite or discuss the Connell case, the district judge below attempted to distinguish it, substantially on the ground that the present statute was not crystal clear and that a congressional waiver of sovereign immunity was to be narrowly construed. This doctrine of "niggardly" construction has been cited in this Act, *State of Maryland, to Use of Burkhardt*, v. *United States*, D. C. Md., 70 F. Supp. 982, though we have had occasion to criticize such application. *Aetna Cas. & Surety Co.* v. *United States*, 2 Cir., — F. 2d —, —. When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself. Particularly should

this be true as to the broad terms of coverage employed in the basic grant of liability itself.[1]

In our view, however, the statutory exception referring to "a foreign country" is sufficiently precise and explicit that, even without the Connell precedent, this claim must be held included in the coverage of the Act. The language of the grant to the United States of the area is explicitly that of a definite lease of territory for a particular period.

As pointed out in the Connell case, there was also incorporated an extensive grant of judicial jurisdiction and of general powers to carry out the purpose of the cession, namely, the establishment of the air bases. There has been much discussion of the somewhat mystic problem as to how far "sovereignty" has been granted; however that may be decided, it would seem that where the United States constructs, operates, and controls an air base so completely as is the actual fact, so obviously in direct line with the intent of the contracting governments, it is on the whole fantastic to consider this territory a foreign country within the meaning of a local statute affecting the relation of this government and private persons.[2]

[1] Congress has indicated this policy by its amendment in 1947 to destroy the basis of defenses made by the Department of Justice in actions based on statutes in two states locally defined as only punitive and not remedial in nature; the amendment extends recovery to cover these cases. See 28 U. S. C. A. § 931 (a) as amended Aug. 1, 1947, c. 446, § 1, 61 Stat. 722, and H. R. Rep. No. 748, 80th Cong., 1st Sess., U. S. Code Cong. Serv. 1947, p. 1548.

[2] Compare *De Lima* v. *Bidwell*, 182 U. S. 1, 180: "A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sover-

Moreover, in the light of the statutory purpose here the result seems the same. The only ground suggested for this particular exception is that defense of such claims, including the locating, preserving, and use of evidence, would involve too great a practical problem to make waiver of immunity as to them either fair or feasible. But if this be the reason for the exception—and it seems to us a reasonable explanation—it surely does not exist in the case of a government-owned-and-controlled air base. Actually with respect to this very accident, there seem to have been the most complete reports and investigations, as would be usual by the Government agencies in such a situation.

The United States Attorney ably and vigorously urges not only the objections we have already noticed, but others, which nevertheless do not persuade us. There seems no difficulty in the reference of the statute back to the local law of the area, here the Newfoundland law which the plaintiff has alleged and plans to prove. Such reliance on foreign law as the source of rights locally enforced is of course not at all unusual in our courts. Nor does it seem of importance that actually the United States has not established any district courts at this air base. We are now particularly concerned with the existence of the right, which must be established before we need turn to the form of remedy. But the remedy here is fully adequate and complete in

eignty of a foreign nation; and without the sovereignty of the United States. The Eliza, 2 Gall. 4, Fed. Cas. No. 4,346; *Tabor v. United States*, 1 Story 1, Fed. Cas. No. 13,722; The Adventure, 1 Brock. 235, 241, Fed. Cas. No. 93."

the alternative provision of the statute as quoted above, allowing venue at the plaintiff's residence as here. Nor do we see any possibility of political complications. The executive agreement is too carefully drawn, it too well adjusts the various rights of the two countries involved, to make it seem possible that any difficulty can arise if the United States pays private claims made against it for negligence at these air bases. Finally, however one may regard the much discussed issue of the relative scope of the executive agreement as against the treaty, it cannot be escaped here that the cession of the area has actually been made and the fact of grant and occupancy is not challenged by anyone. It would certainly be too refined a thesis to deny this plaintiff recovery on the ground that, though the high contracting parties were quite satisfied, the grant was inoperative because it was made pursuant to executive agreement, and not treaty. Were this thesis to be adopted, then indeed this private litigation might have political, if not international, complications vastly embarrassing, one fancies, to this very defendant here.

Reversed and remanded.

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